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July 1, 2005

Commissioner for Trademarks
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P.O. Box 1451
Alexandria, VA 22313-1451

Re: Christopher Brooks v. Creative Arts by Calloway, LLC
Opposition No. 91160266 (CAB CALLOWAY)

75761159

Dear Sir/Madam:



AUSTIN

BOSTON

DALLAS

DELAWARE

NEW YORK

SAN DIEGO

SILICON VALLEY

TWIN CITIES

WASHINGTON, DC

Enclosed please find the following documents for filing in connection with the above-referenced case:

- 1) APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT;
- 2) DECLARATION OF CABELLA CALLOWAY LANGSAM IN SUPPORT OF APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT;
- 3) DECLARATION OF JOEL D. LEVITON IN SUPPORT OF APPLICANT'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Also enclosed please find a self-addressed stamped postcard for you to return to us to acknowledge the receipt of this filing.

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Cynthia Johnson Walden



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July 1, 2005

Page 2

Please contact me with any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Cynthia Johnson Walden", followed by a horizontal flourish line.

Cynthia Johnson Walden

cc: Barbara A. Solomon, Esq.
Evan Gourvitz, Esq.

21120008.doc

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

----- X

CHRISTOPHER BROOKS,	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91160266
	:	
CREATIVE ARTS BY CALLOWAY, LLC,	:	
	:	
Applicant.	:	

----- X

**APPLICANT'S MEMORANDUM IN OPPOSITION
TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT**

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STATEMENT

This memorandum is submitted by Applicant, Creative Arts by Calloway, LLC, in opposition to the motion for summary judgment filed by Opposer, Christopher Brooks. Appended to this memorandum is Exhibit A, Applicant's response to Opposer's "Statement of Undisputed Material Facts." Also submitted in opposition to the motion are the declarations and exhibits of Cabella Calloway Langsam and Joel D. Leviton, Esq.

The documentary record in support of the motion for summary judgment includes the following documents, which will be abbreviated as follows:

Opposer's Motion	("Opp. Mot".)
The Application file	("App. File" or "Application")
The file in this proceeding, the substantive papers of which are the Notice of Opposition and Answer	("Not. Opp.") ("Ans.")
Not. Opp. Exhibit A – the December 11, 2001 Memorandum and Order in S.D.N.Y. 01 Civ. 3191 (CLB)	("M&O") and the
Summary Order in Appeal thereof	("App.Sum.Ord.")
The Brooks declaration and exhibits	("Brooks Decl." and "Ex.")
The Statement of Undisputed Material Facts submitted in support of the motion	("SUMF")
Opposer's Memorandum in Support of the Motion	("Opp. Memo.")

APPLICANT'S POSITION, IN SUMMARY

1. The factual basis for Opposer's motion is contained largely in the Brooks Decl. and exhibits, and the references thereto and conclusions therefrom stated in Opp. Memo. Neither the declaration nor the conclusions drawn from it has been tested by discovery (the documents first appeared after discovery had closed). As is demonstrated by Exhibit A hereto, it is apparent that at least some of Opposer's factual case is, in the context of the present motion, artfully stated (see, *e.g.*, Ex. A, ¶¶ 5, 6, 8, 23). Applicant is confident that the motion is ill-founded, both for legal reasons and due to insufficient

factual evidence of secondary meaning identifying Opposer as the source of services rendered under CAB CALLOWAY on or before Applicant's priority date, July 23, 1999. As a formality, however, we point out that because so much of the "evidence" submitted by Opposer lies primarily within the knowledge of Mr. Brooks, it appears highly probable that Opposer is unable to present by affidavit (or declaration) additional facts which would justify its opposition to this motion without further discovery. See Fed.R.Civ.P. 56(f).

2. Because the application at issue is an ITU application, Applicant has its filing date, July 23, 1999, as its priority date. Opposer's claim necessarily (and admittedly) falls under Section 2(d) of the Trademark Act, which requires that Opposer demonstrate either a registration or common law trademark right that existed before July 23, 1999. Opposer asserts no registration right, so it must establish a pre-July 23, 1999 common law right to some CAB CALLOWAY mark (THE CAB CALLOWAY ORCHESTRA appears to be his choice). At common law, CAB CALLOWAY – the name – is not inherently distinctive, and therefore is a trademark only if it has acquired secondary meaning identifying Opposer as the source of the goods and services. Opposer has neither demonstrated secondary meaning nor anything from which such acquired distinctiveness might be inferred prior to July 23, 1999. Indeed, much in the record indicates that CAB CALLOWAY identifies Mr. Brooks' deceased grandfather, not Mr. Brooks, as the source of many musical performances, some of which have been recorded and continue to be sold.

3. The prior District Court action between the parties has no significant preclusive effect in this proceeding. In that action, Applicant here asserted common law service mark rights derived from Mr. Calloway's activities during his lifetime (which the Court held it did not possess) against Opposer's use of THE CAB CALLOWAY ORCHESTRA. There was no ruling that Opposer owned superior rights to CAB CALLOWAY as between the parties. Even if there had been, such a ruling would not be binding here, because it was unnecessary to the ruling in the District Court case. Here, Opposer asserts whatever common law rights he may have had in CAB CALLOWAY prior to July 23, 1999 against Applicant's trademark application. The earlier litigation tells us nothing about that claim.

4. Where the parties differ as a matter of law is on whether personal name marks such as CAB CALLOWAY must acquire distinctiveness or are inherently distinctive from the date of first use. If Opposer is correct that personal name marks are inherently distinctive, then it loses because Applicant is the owner of common law rights that predate Opposer's claimed first use of THE CAB CALLOWAY ORCHESTRA. These rights of Applicant are substantially identical to the service mark subject to the Application (and indeed entirely identical with respect to certain services). Applicant's ownership of these common law rights, which are well documented below, allow Applicant to tack these rights to its statutory priority date of July 23, 1999. In addition, because Applicant owns prior common law rights in the CAB CALLOWAY trademark and service mark, Opposer may not rely on its use of THE CAB CALLOWAY ORCHESTRA to establish priority, as such use is unlawful.

ARGUMENT

I. OPPOSER HAS FAILED TO DEMONSTRATE THAT IT HAS ESTABLISHED SECONDARY MEANING IN ANY "CAB CALLOWAY" MARK AT OR BEFORE JULY 23, 1999

A. It is Necessary for Opposer to Demonstrate Secondary Meaning to Establish Trademark Rights in the CAB CALLOWAY Name

This opposition is expressly based upon Section 2(d) of the Trademark Act. Not. Opp. ¶ 7.¹ It also expressly concedes that Applicant's priority date is July 23, 1999. Not. Opp. ¶ 5.² Opposer also expressly alleges that "THE CAB CALLOWAY ORCHESTRA mark has become distinctive of Opposer's goods and services," Not. Opp. ¶ 3, although, curiously, he does not indicate the time of that alleged event.

¹ "Any use of Applicant's Mark by Applicant is likely to cause confusion, cause mistake or deceive the public, and cause the public to believe that the services offered under Applicant's Mark emanate from or are otherwise sponsored by or endorsed by Opposer, *in violation of Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d)*." (emphasis added).

² "The only date on which Applicant can rely for purposes of priority is the filing date of July 23, 1999...."

It is clear, however, that for the Opposition to be viable, the time must be before the Applicant's priority date, because the hallmark of a Section 2(d) opposition is that "the opposer contends that applicant's mark so resembles either (1) opposer's registered mark or (2) opposer's *prior* common-law mark or trade name as to be likely to cause confusion." 3 *McCarthy on Trademarks and Unfair Competition* § 20:14 (4th ed. Rel. 32, 12/2004), emphasis added.

Opposer's claimed mark is THE CAB CALLOWAY ORCHESTRA (See Not. Opp. ¶¶ 1-3, 5-6 and 8), which comprises what is surely one of the most common articles in the language ("the"), the generic term "orchestra" and "Cab Calloway," which Opposer pleads is the name of "the internationally famous jazz musician Cab Calloway." Not. Opp. ¶ 1. Plainly, the only matter of any trademark consequence in Opposer's claimed mark is the name CAB CALLOWAY. Indeed, Opposer pleads that CAB CALLOWAY "is nearly identical in sound, meaning and commercial impression to Opposer's mark THE CAB CALLOWAY ORCHESTRA. . . ." Not. Opp. ¶ 6.

Personal names (surnames and first names) have been placed by the common law into that category of non-inherently distinctive terms which require proof of secondary meaning for protection. . . .

* * *

[Personal names] acquire legally protectable status only after they have had such an impact upon a substantial part of the buying public as to have acquired "secondary meaning." That is, the public has come to recognize the personal name as a symbol that identifies and distinguishes the goods or services of only one seller.

2 *McCarthy on Trademarks and Unfair Competition* § 13:2 (4th ed. Rel. 33, 3/2005), footnotes omitted.³

³ Similarly, see: "Personal names, including both first names and surnames, are not considered to be inherently distinctive and are therefore protectable as trademarks . . . only upon proof of secondary meaning. Thus, the first person who adopts a particular person's name to identify the person's goods, services or business obtains no rights in the designation unless consumers have in fact come to recognize the name as a symbol that distinguishes the products or business of that person from those of others." *Restatement (Third) of Unfair Competition* § 14, Comment e. Also see: "Just as with descriptive terms, a trademark or trade name that consists of a personal name (first name, surname, or both) is entitled to legal

B. *Opposer has Failed to Demonstrate the Requisite Secondary Meaning as of July 23, 1999*

Opposer asserts service mark rights in THE CAB CALLOWAY ORCHESTRA for live musical performances, and trademark rights in the mark for audio and video recordings of the entertainment services. Not. Opp. ¶ 1.

Live Musical Performances

The crux of the secondary meaning doctrine is that the mark comes to identify not only the goods but the source of those goods. To establish secondary meaning, it must be shown that the *primary* significance of the term in the minds of the consuming public is not the product, but the producer (citations omitted).

Ralston Purina Co. v. Thomas J. Lipton, Inc., 341 F. Supp. 129, 133 (S.D.N.Y. 1972). See TMEP § 1212, which quotes this test.

The ways secondary meaning may be proven for trademark application purposes are: (i) ownership of a prior Principal Register registration of the same mark for the same or closely related goods and services; (ii) 5 years' "substantially exclusive and continuous" use under Section 2(f); and (iii) "actual evidence." TMEP § 1212. This is a lesser standard than would be required of Opposer by the common law, although that makes no difference here, because Opposer does not meet either of the first two criteria. He must prove secondary meaning by "evidence" or not at all. TMEP § 1212.06 sets forth the evidentiary considerations by which secondary meaning may be established as follows: (a) "Long Use of the Mark," (b) "Advertising Expenditures," (c) Affidavits or Declarations Asserting Recognition of Mark as Source Indicator, and (d) "Survey Evidence, Market Research and Consumer Reaction Studies." Courts employ various lists, most of which encompass these factors and, sometimes, others.⁴

protection only if it attains secondary meaning." 1 Gilson, *Trademark Protection and Practice* § 2.03[4][d] (Rel. 53-10/04).

⁴ One of the most comprehensive, recent list of factors is found in *Commerce Nat'l Ins. v. Commerce Ins.*, 214 F.3d 432, 438 (3d Cir. 2000): (1) extent of sales and advertising leading to buyer association, (2) length of use; (3) exclusivity of use; (4) the fact of copying; (5) customer surveys; (6) customer testimony; (7) use of the mark in trade journals; (8) the size of the company; (9) the number of sales; (10)

Just looking at the TMEP list of “evidence” factors, it is evident Opposer has made no case for secondary meaning. Use, even assuming it is continuous, from December 1998 (SUMF ¶ 5) to July 23, 1999 is nobody’s idea of “long” use, and there is no evidence of particularly widespread or frequent use during the critical period; there is no evidence of advertising expenditures prior to July 23, 1999; and there are no affidavits or declarations asserting recognition of CAB CALLOWAY as a source indicator for Opposer, surveys, market research or consumer reaction studies. In short, Opposer has not even made a credible attempt to establish secondary meaning.

Evidence (or lack thereof) aside, given the relatively brief period of use by Brooks, it is highly unlikely that Brooks’ association with the CAB CALLOWAY mark had supplanted the original meaning of the name. More than two years after the critical date, it was recognized that “during a long productive professional life, Mr. Calloway created a style and legend that resonates in the music world.” M&O p. 6. The “great Cab Calloway [was a] world-renowned jazz musician, composer and entertainer.” *Id.*, p.2.

Audio recordings

There is an additional problem with audio recordings. Until July 23, 1999, there was only one recorded album by THE CAB CALLOWAY ORCHESTRA; the second recording was not sold until after July 23, 1999. See Brooks Decl. ¶ 12. At that point, the name was merely descriptive of the artist(s) performing on the recording, and did not function as a trademark. *In re Spirer*, 225 USPQ 693 (TTAB 1985).

It is well settled that the title to a *series* of records or books is able to function as . . . a trademark. . . . The reason is that

the number of customers; and (11) actual confusion. Factors 4, 8 and 11 on this list are not comprehended by, or reasonably subsumed within, the TMEP factors; nor do any of them appear to favor Opposer in this case. Accordingly, we use the TMEP “evidence” factors with which the Board presumably is most familiar, incorporating with them such *Commerce Insurance* factors as seem logically related to the express Board factors.

[T]he name for a series, at least while it is still being published, has a trademark function in indicating that each book of the series comes from the same source as the others. The name of the series is not descriptive of any one book and each book has its individual name or title. . . .

In conclusion, just showing the name of the recording group on a record will not by itself enable that name to be registered as a trademark. Where, however, the owner of the mark controls the quality of the goods, and where the name of that recording group has been used numerous times on different records and has therefore come to represent an assurance of quality to the public, the name may be registered as a trademark since it functions as one.

In re Polar Music Int'l AB, 714 F.2d 1567, 1572, 221 USPQ 315, 318 (Fed. Cir. 1983).

Video Recordings

Similarly, Opposer has only identified one video recording alleged to have been distributed prior to July 23, 1999, so there is no series from which THE CAB CALLOWAY ORCHESTRA could acquire trademark significance.

C. Opposer's Argument that CAB CALLOWAY is Inherently Distinctive is Neither Correct nor Permissible on the Basis of the "Authority" on Which He Relies

Opposer attempts to avoid the rigor of the foregoing analysis by simply stating THE CAB CALLOWAY ORCHESTRA is inherently distinctive of Opposer's goods and services. Opp. Memo. p. 9. His only cognizable authority for so saying is *Michael S. Sachs, Inc. v. Cordon Art B.V.*, 56 USPQ2d 1132 (2000). What this authority explains is that the name of an artist (in that case, a painter) "may function as a trademark." 56 USPQ2d at 1137. "As a general comment, we would point out that the name of an artist, in addition to identifying the artist, may serve a trademark function if it identifies the source of a product and distinguishes it from the goods of another." 56 USPQ2d at 1135, n.8. In other words, the name of an artist serves a trademark function only if it identifies source and distinguishes the artist's goods from those of another. If it does not do those things, it is not a trademark, it is just a name – without secondary meaning, which is the issue here. The conclusion Opposer trumpets is that "the name of an artist is presumptively not merely descriptive." 56 USPQ2d at 1137. The name of an artist, however, is presumptively a personal name, and the authority is unanimous that to be protected as a trademark, personal names must have secondary meaning. *Supra* at footnote 3. Opposer itself repeatedly emphasized that point to the courts in earlier litigation against Applicant:

If a name, regardless of how famous it is, refers primarily to the individual it is not and cannot be protected as a mark. The only personal names that are protected as valid marks are those that have acquired a “secondary meaning” so that they are synonymous in the minds of the public with a specific ongoing business, or with the sole source of origin for all goods or services offered under the name.⁵

It is black letter law that personal names are merely descriptive and are protected only if, through usage, they have acquired distinctiveness and secondary meaning.⁶

In order for plaintiff to have a legally protectable right in “Cab Calloway,” plaintiff must first establish that the name has acquired secondary meaning.⁷

The argument Opposer attempts to make is that because marks are barred from registration only if they are “primarily merely a surname” (Lanham Act § 2(e)(4)), personal names are inherently distinctive.⁸

⁵ Excerpt from Brief for Defendant-Appellee, pp. 18-19, *Creative Arts By Calloway v. Brooks*, U.S. Ct. Appls, 2d Cir. # 02-7050. Leviton Decl., Ex. 1.

⁶ Excerpt from Memorandum of Law in Support of Defendant’s Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for a Preliminary Injunction, p. 11, *Creative Arts By Calloway v. Brooks*, U.S. Dist. Ct. S.D.N.Y. # 01 Civ. 3192 (BDP). Leviton Decl., Ex. 2.

⁷ Excerpt from Defendant’s Memorandum of Law in Further Support of His Motion for Summary Judgment, p. 5, *Creative Arts By Calloway v. Brooks*, U.S. Dist. Ct. S.D.N.Y. # 01 Civ. 3192 (BDP). Leviton Decl., Ex. 3.

⁸ In flagrant disregard of stated Board practice, Opposer attempts to rely upon two unpublished decisions, *In re St. Clair Apparel, Inc.* and *Remos v. Feierman*, simply noting in its citations that each is “(non-precedential).” The very first thing each decision states – before even its name – is:

THIS DISPOSITION IS NOT CITABLE AS PRECEDENT OF THE T.T.A.B.

If that is not sufficiently clear that Opposer may not rely upon either decision as TTAB precedent, TBMP §101.03 makes it even clearer:

Decisions that are designated by the Board “citable as precedent” or “for publication in full” are citable as precedent. Decisions which are not so designated. Or which are designated for publication only in digest form, are not citable as authority. . . .

Granted that personal names which are not primarily merely surnames will be accepted for registration, published and, if not opposed and used, registered. However, that departure from the common law benefits applicants, not opposers. Under Section 2(d), Opposer's chosen weapon in this proceeding, it must assert either a prior registration or common law right. It has no prior registration, so it is bound by the common law, which, as Opposer earlier pointed out repeatedly, demands secondary meaning before personal names may be asserted as trademarks.

II. THE PRIOR LITIGATION BETWEEN THE PARTIES HAS NO PRECLUSIVE EFFECT ON THIS MOTION

The Federal Circuit Court has stated that it (the Court) will be "guided by *Restatement (Second) of Judgments* (1982) in analyzing what preclusive effect should be given in subsequent litigation." *Miller Brewing Co. v. Coy Int'l Corp.*, 230 USPQ 675, 677 (TTAB 1986), (citing *Chromalloy American Corp. v. Kenneth Gordon Ltd.*, 736 F.2d 694, 222 USPQ 187 (Fed. Cir.1984) and *Young Engineers v. Int'l Trade Commission*, 721 F.2d 1305, 219 USPQ 1142 (Fed. Cir. 1983)).

In *General Mills v. Health Valley Foods*, 24 USPQ2d 1270, 1275, n. 9 (TTAB 1992), the Board explained:

Upon reflection, the Board has decided that citation of "unpublished" or "digest" Board decisions will no longer be allowed. In the future, the Board will disregard citation as precedent of any unpublished or digest decision. Even if a complete copy of the unpublished or digest decision is submitted, the Board will disregard citation as precedent thereof. . . . Decisions are not published because, in virtually all cases, they do not add significantly to the body of existing law and/or they are not of widespread legal interest. By deciding that a decision will not be recommended for decision, the Board has in effect declared that the decision has no value as legal precedent.

More recently, *In re Polo Int'l Inc.*, 51 USPQ2d 1061, 1063 n.3 (TTAB 1999) ruled:

Applicant, although acknowledging that it was a non-precedential case, nonetheless referred in its brief to [one such case]. The Board disregards citation to any non-precedential decision (unless, of course, it is asserted for res judicata, law of the case or other such issues).

Accordingly, the fundamental operating principle is:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (emphasis added).

It is not entirely clear how Opposer believes the outcome of the 2001 suit by Applicant against Opposer benefits him here. The best we can do is consider his recitation in the *Introduction* to his Memorandum supporting the Motion. To begin, Opposer states the following:

In 2001, Applicant filed suit against Opposer in the United States District Court for the Southern District of New York. . . . In the Civil Action, Applicant claimed it had prior rights in the mark CAB CALLOWAY for entertainment services and that Opposer's use of the mark THE CAB CALLOWAY ORCHESTRA for his own entertainment services – notably, orchestra performances and the distribution of compact discs and videos of those performances – was likely to cause confusion. . . .

Opp. Memo. pp. 1-2. So far, we have no quarrel with this recitation of facts (for present purposes, anyway). But Opposer continues:

However, Applicant did not dispute in the Civil Action that Opposer had been using THE CAB CALLOWAY ORCHESTRA in connection with his entertainment services since 1998, and in connection with his compact discs and videotapes since 1999.

Opp. Memo. p. 3.

Why would Applicant have disputed those dates in the court case, which was addressed to a situation in 2001? As a reading of the decision makes clear, Applicant in the suit relied on rights it had acquired from the Mr. Calloway's estate in the service mark CAB CALLOWAY, which rights predated any rights Opposer could assert. It turned out in the litigation that Applicant was deemed to have no such rights, so decision was granted in Opposer's favor. The issue of priority between the parties arises only in

this proceeding, in which the issue is whether Opposer has a common law right earlier than Applicant's July 23, 1999 filing date. This is the first time that issue has arisen.⁹

Applicant goes on to state:

Applicant's suit was dismissed on summary judgment and the dismissal was affirmed by the Second Circuit [Court of Appeals]. The basis for the dismissal was that as of the time of the suit Applicant had no rights in and had made no use of CAB CALLOWAY as a mark.¹⁰

Opp. Memo., p. 3. But then, Applicant states:

These decisions make it impossible for Applicant to now claim rights predating Opposer's acquisition of rights in the mark THE CAB CALLOWAY ORCHESTRA, given Opposer's own use of THE CAB CALLOWAY ORCHESTRA as his own mark for entertainment services since 1998, as confirmed by both the Southern District of New York and Second Circuit.

Id.

In the first place, Applicant need not claim rights predating Opposer's acquisition of rights in THE CAB CALLOWAY ORCHESTRA. It is incumbent upon Opposer, for the first time, to establish indisputably a priority date before July 23, 1999, the filing date of the application he opposes. This he has neither done, nor had to do, in any previous litigation between the parties.¹¹ In the second place, even

⁹ It was very clear when the 2001 case started that Applicant could not assert its constructive priority date against Opposer because the priority right vests only upon registration. Trademark Act § 7(c); *Talk to Me Prods. v. Larami Corp.*, 804 F. Supp. 555, 559-60 (S.D.N.Y.), *aff'd*, 992 F.2d 469 (2d Cir. 1993).

¹⁰ That is a fair reading of the Court's holding; however, as will be seen elsewhere (see *infra* n. 13) it is not an entirely correct recitation of the actual facts. The difference, however, is immaterial to this particular argument.

¹¹ Opposer cites to page 3 of the District Court opinion. M & O p. 3 does, indeed, state that Opposer started his orchestra in 1998 and that since December, 1998, he had performed over 150 concerts using the name THE CAB CALLOWAY ORCHESTRA. 1. The Court's decision is dated December 11, 2001; it makes no finding as to number of concerts before July 23, 1999 (the only arguably pertinent fact here). 2. The decision makes no finding (at least in the portion cited by Opposer) that Opposer's activity vested

if the fact had been determined, it was plainly superfluous to the decision that was made, and therefore is not preclusive because it is not a “determination [that] is essential to the judgment.” *Restatement (Second) of Judgments* § 27.

If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

Restatement (Second) of Judgments § 27, Comment h.¹²

Opposer’s ultimate conclusion appears to be that “At most, Applicant can rely on the filing date of its intent-to-use application, July 23, 1999, which is *after* Opposer established his rights.” Opp. Memo p. 3. The formulation is a bit odd, considering that in proceedings of this nature it is Opposer that must establish common law rights prior to the filing date. While, for reasons already explained, it does not appear possible for Opposer to do so, the fact remains that at this point he has certainly fallen woefully short of demonstrating that his success in this endeavor is an undisputed material fact.

him with trademark rights in CAB CALLOWAY ORCHESTRA or, if it did, when. 3. These “findings are expressly stated to be “undisputed *or* assumed for purposes of the motions” (M & O p. 2, emphasis added); either way, they fall considerably short of the “actually litigated and determined” requirement of *Restatement (Second) of Judgments* § 27.

¹² Opposer, at Opp. Memo p. 3, also cites the Second Circuit Court of Appeals’ decision. That decision simply repeats the District Court’s “undisputed” or “assumed” facts, and engages in no independent fact finding (as is true of the vast majority of appellate opinions).

III. IF OPPOSER IS CORRECT THAT PERSONAL NAME MARKS ARE INHERENTLY DISTINCTIVE AND CREATE TRADEMARK RIGHTS UPON FIRST USE, APPLICANT'S PRIOR COMMON LAW TRADEMARK AND SERVICE MARK USE RIGHTS PREVENT SUMMARY JUDGMENT FROM BEING GRANTED IN FAVOR OF OPPOSER

Applicant is the owner of common law trademark and service mark rights in the designation CAB CALLOWAY in connection with certain goods and services that predate Opposer's alleged first use dates.¹³

Applicant's prior common law rights are relevant for two reasons. First, Applicant may, for priority purposes, tack its prior use of the CAB CALLOWAY mark, and marks that are the legal equivalent thereto, in connection with services "substantially identical" to services identified in the Application. *Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 17 USPQ2d 1866, 1868 (Fed. Cir. 1991); *Big Blue Prods. Inc. v. Int'l Business Machines Corp.*, 19 USPQ2d 1072, 1075 (TTAB 1991). Second, Opposer may not rely on unlawful use of the CAB CALLOWAY ORCHESTRA mark to establish priority.

¹³ Such rights were not at issue in the District Court Action, were not litigated in the District Court action, and were not material to the outcome of that action. The District Court action was limited to whether Applicant had service mark rights in CAB CALLOWAY originating during Mr. Calloway's lifetime for entertainment services. The District Court held that Applicant did not have such service mark rights because Mr. Calloway's will did not transfer an ongoing business to Mrs. Zulme Calloway ("Cab Calloway had not provided in his will for the continuation of his orchestra or other entertainment services") and Zulme Calloway did not continue Mr. Calloway's entertainment services after his death ("The will did not contemplate that Mrs. Calloway would continue in the position of directing the band, and there is no evidence that she was capable of doing so.") Whether Applicant had trademark or service mark rights in other contexts was not at issue in the Civil Action and therefore is not precluded from future adjudication.

A. *Applicant Owns Prior Common Law Rights In the Service Mark CAB CALLOWAY for Education Services and the Production of Concerts and Plays*

Cab Calloway and his wife Zulme frequently traveled to Delaware to visit their daughter Cabella Calloway Langsam. Declaration of Cabella Calloway Langsam ("Langsam Decl."), ¶ 8. Eventually, Cab and Zulme Calloway moved from New York to Delaware, where Mr. Calloway died in 1994. *Id.* In Delaware, Mr. Calloway became involved with the development of a new performing art school located in Wilmington, Delaware. *Id.* In 1992, Mr. Calloway cut the ribbon at the grand opening ceremony for the Middle School for Creative and Performing Arts. *Id.*, ¶ 8. Shortly after the school opened, the school sought permission from Mr. Calloway to use his name in the name of the school to honor Mr. Calloway. *Id.*, ¶ 9. In October of 1993, the Middle School for Creative and Performing Arts was renamed the Cab Calloway School of the Arts. *Id.*, ¶ 10.

Since October 1993, the school, as a licensee of Applicant (including its predecessor in interest), has continuously operated under the name Cab Calloway School of the Arts. *Id.*, ¶ 10, Ex. 5. The Cab Calloway School of the Arts is a public school in Delaware's Red Clay Consolidated School District. *Id.*, ¶¶ 9, 10. The school is commonly known, and frequently referred to, as "Cab Calloway" by school officials, the students, and the community. *Id.*, ¶ 10, Ex. 5.

The school holds a license to, and does in fact, provide a variety of services under the CAB CALLOWAY service mark including education services and producing and presenting live music concerts, live theatrical plays, and live musicals, among other services. *Id.*, ¶ 11, Ex. 6. Since at least as early as 1994, the school has used the CAB CALLOWAY service mark in connection with the production of theatrical plays. *Id.* Cab Calloway School of the Arts regularly presents concerts and plays both at the school and at other venues. *Id.*

The school has also used the CAB CALLOWAY mark in connection with the production of live musical concerts since at least as early as 1996, and probably even earlier. *Id.* The school's use of the CAB CALLOWAY and CAB CALLOWAY SCHOOL OF THE ARTS service marks for educational

services and theatrical, musical, and concert production services predates Opposer's claimed first use date of December 1998 and inures to the benefit of Applicant. *Id.*

B. Applicant Owns Prior Common Law Trademark Rights In the CAB CALLOWAY Mark for Clothing

Applicant owns prior common law rights in CAB CALLOWAY for clothing through the use by its licensee, The Cab Calloway School for the Arts, which sells various items of clothing, including jackets, T-shirts and sweatshirts. Langsam Decl., ¶ 12, Ex. 7. These rights date back to 1994. *Id.*

Furthermore, Applicant's predecessor in interest granted a trademark license to Gear Ink. to manufacture and offer for sale T-shirts bearing the CAB CALLOWAY trademark. *Id.*, ¶ 18, Ex. 12. Gear Ink sends royalty checks to Applicant as consideration for the license to use the CAB CALLOWAY trademark on shirts and has been doing so since at least 1996. *Id.* Opposer is well aware that Gear Ink holds a license to use the CAB CALLOWAY trademark on shirts, as Opposer submitted a declaration from the owner of Gear Ink in the District Court action to support Opposer's position that CAB CALLOWAY had not acquired secondary meaning to identify Mr. Calloway's entertainment services because the total sales of shirts bearing the CAB CALLOWAY mark from 1996 to 2001 amounted to \$10,000, which, according to the owner of Gear Ink, is "minimal." Leviton Decl., Ex. 4. (Incidentally, based on the figures provided in the owner's declaration, Gear Ink sold approximately 600 shirts bearing the CAB CALLOWAY trademark from 1996 until June of 2001. *Id.*, Ex. 4.) Applicant's rights in the CAB CALLOWAY trademark for T-shirts predates Opposer's claimed first use date of December 1998 and inure to the benefit of Applicant.

C. Applicant Owns Prior Common Law Trademark Rights in CAB CALLOWAY for Sound Recordings

When an artist controls the quality of the recordings, and releases multiple albums bearing the name of the artist, the artist's name functions as a trademark owned by the artist. *In re Polar Music Int'l AB.*, 714 F.2d 1567, 1572 (Fed. Cir. 1983) ("[T]he owner of the mark controls the quality of the goods, and where the name of that recording group has been used numerous times on different records and has therefore come to represent an assurance of quality to the public, the name may be registered as a

trademark since it functions as one.”). Over the course of Mr. Calloway’s sixty-plus year career, Mr. Calloway released numerous record albums bearing his name. *Id.*, ¶ 3, Ex. 1. As a result, CAB CALLOWAY become a trademark identifying Mr. Calloway’s recorded music.

As a well-known band leader, Mr. Calloway exercised creative control over the music he recorded and was ultimately responsible for the sound of the recorded music. Langsam Decl., ¶¶ 4, 5. In addition, Mr. Calloway authored or co-authored, and arranged, many of the songs he recorded. *Id.* As the person responsible for quality of the sound of the songs being recorded, Mr. Calloway owned the trademark right in the CAB CALLOWAY designation in connection with sound recordings.¹⁴

In his will, Mr. Calloway transferred “all of [his] property and estate, real, personal and mixed, or whatever kind” to his wife Mrs. Zulme Calloway. Langsam Decl., Ex. 9. Mrs. Calloway subsequently transferred the intellectual property rights she received to Applicant. Langsam Decl., Ex. 11. The district court’s holding that Mr. Calloway’s will did not transfer any rights in the CAB CALLOWAY service mark for entertainment services because Mr. Calloway’s widow did not carry on Mr. Calloway’s entertainment services does not apply to the transfer of the CAB CALLOWAY trademark for sound recordings. Mr. Calloway’s recordings continue to be sold under the CAB CALLOWAY trademark to this day and the trademark continues to identify the very recordings it identified during Mr. Calloway’s lifetime. As a result, the CAB CALLOWAY trademark presently symbolizes the very goodwill it symbolized when Mr. Calloway was alive. As the owner of Mr. Calloway’s intellectual property, Applicant is the owner of the CAB CALLOWAY trademark for sound recordings. Applicant’s rights in

¹⁴ Although whether CAB CALLOWAY functioned as a trademark for sound recordings was not at issue in the District Court action, Opposer asserted that CAB CALLOWAY had not acquired secondary meaning to identify Mr. Calloway’s entertainment services since more than one record company distributes recordings of Cab Calloway. Leviton Decl., Ex. 1, p. 23. The fact that multiple record companies distribute recordings of Cab Calloway’s music does not mean that Mr. Calloway did not control the quality of the music being recorded – that is, the goods being sold under the trademark.

the CAB CALLOWAY trademark for sound recordings predate Opposer's claimed first use date of December 1998.

D. Applicant May Tack Its Prior Common Law Trademark and Service Mark Rights

A party may tack the earlier use of one mark on to the later use of a mark that is legally equivalent to the earlier-used mark. *Van Dyne-Crotty Inc.*, 17 USPQ2d at 1868 ("The previously used mark must be the legal equivalent of the mark in question or indistinguishable therefrom...."). In addition, a party may tack prior use of a mark for certain goods or services on to use of the same mark for other goods and services if the two sets of goods and services are "substantially identical." *Big Blue Prods. Inc.*, 19 U.S.P.Q.2d at 1075 ("[T]he tacking of the use of a mark for certain goods or services onto the use of the same mark for other goods or services – for the purpose of obtaining or maintaining a registration – should be permitted only when the two sets of goods or service are 'substantially identical.'").

Applicant's statutory priority date is July 23, 1999. Applicant, however, may tack its prior common law rights to establish an earlier priority date. As set forth above, Applicant, through its licensee the Cab Calloway School of the Arts, has used the service marks CAB CALLOWAY and CAB CALLOWAY SCHOOL OF THE ARTS in connection with educational services and the production of live music concerts, theatrical plays, and musicals, among other services. Langsam Decl., ¶¶ 10, 11, Ex. 6. The designation CAB CALLOWAY used by the school is, obviously, identical (and therefore legally equivalent) to the service mark CAB CALLOWAY subject to the Application. The service mark CAB CALLOWAY SCHOOL OF THE ARTS is the legal equivalent of the CAB CALLOWAY mark subject to the Application, as the distinctive component of the service mark used by the school is CAB CALLOWAY and the terms SCHOOL OF THE ARTS are merely the generic name of the education services offered in connection with the CAB CALLOWAY mark. Because CAB CALLOWAY and CAB CALLOWAY SCHOOL OF THE ARTS are both the legal equivalent of the CAB CALLOWAY mark subject to the Application, Applicant may rely on this earlier use of the service mark for the purpose of establishing priority in this proceeding.

In addition, Applicant may rely on the school's prior use of the CAB CALLOWAY service mark because the services offered by the school under the mark are "substantially identical" to services identified in the Application. The school renders, among other services, production of live music concerts, live theatrical plays, and musicals. Langsam Decl., ¶ 11, Ex. 6. The Application covers, among other services "production of live music concerts and live theatrical plays", "production of comedies, musicals and dramas", and "theatrical production of musicals, comedies and dramas." Certain services rendered by the school under the CAB CALLOWAY service mark are substantially, if not entirely, identical to services identified in the Application. Accordingly, Applicant may rely on its licensee's earlier use of the CAB CALLOWAY service mark for the purpose of establishing priority in this proceeding. *See Big Blue Prods. Inc.*, 19 USPQ2d at 1075 ("IBM – in order to obtain a registration of BIG BLUE for typewriter ribbons – will be permitted to tack the two uses together only if the earlier public use of BIG BLUE involved typewriter ribbons or 'substantially identical' products emanating from IBM.").

As addressed above, Applicant also holds common law rights in the trademark CAB CALLOWAY for sound recordings. The recitation of services in the Application also includes "production of video tapes and sound recording." As Opposer recognizes, the production of sound recordings "is overlapping if not identical" to the tangible object containing the sound recording. *See* Opp. Memo p. 15. Because the production of sound recordings are substantially identical to sound recordings themselves, Applicant may also rely on its prior rights in the CAB CALLOWAY trademark for sound recording for the purpose of establishing priority in this proceeding.

Applicant's rights in the CAB CALLOWAY trademark and service mark and the CAB CALLOWAY SCHOOL OF THE ARTS service mark predate Opposer's alleged first use date of December 1998. Applicant may rely on these prior rights. As such, Applicant has priority in this Proceeding.

E. Opposer May Not Rely On Unlawful Use of THE CAB CALLOWAY ORCHESTRA Mark To Establish Priority

In addition to the arguments set forth above, “[T]he Board may, in determining priority or use, refuse to give a party the benefit of use that was not lawful.” *Big Blue Prods. Inc.*, 19 USPQ2d at 1075. If Opposer adopted the CAB CALLOWAY ORCHESTRA mark when CAB CALLOWAY already had been appropriated by Applicant, Opposer’s use would not be lawful. *See id.* at 1076.

Applicant has rights in the CAB CALLOWAY mark in connection with (1) education services, (2) the production of concerts and plays, (3) clothing, and (4) sound recording, all of which predate Opposer’s claimed first use date of December 1998 for his entertainment services. Langsam Decl. ¶¶ 3-5, 11, 12, 18, Exs. 1, 5, 6, 7, 12. As Opposer himself admits, there is a likelihood of confusion between CAB CALLOWAY as used in connection with the services identified in the application (which includes the production of concerts and plays) and the CAB CALLOWAY ORCHESTRA for Opposer’s entertainment services and his compact discs and videotapes. Opp. Memo. pp. 10-18. Given Applicant’s priority, there is little question that Opposer’s use of the CAB CALLOWAY ORCHESTRA mark constitutes infringement.

Applicant’s calculated and ongoing practice of exploiting the intellectual property once owned by Mr. Calloway despite the fact that Mr. Calloway did not transfer any of his intellectual property to Opposer should prevent Opposer from establishing priority in the opposition.

CONCLUSION

This proceeding (and possible appeals) will be the decisive battlefield in the struggle between Applicant (Mr. Calloway’s rightful heirs) and Opposer (Mr. Calloway’s grandson). The prior District Court action between the parties concluded that rights to CAB CALLOWAY as a service mark expired with, or shortly after, the demise of Mr. Calloway. The only rights to the name are new rights, the contestants for which are family and descendants of Mr. Calloway.

Each contestant had two possible ways to gain priority – common law use and statutory trademark registration. Applicant indisputably is and was the first to file for trademark rights, and that

priority will prevail unless Opposer can demonstrate a prior common law right. If Professor McCarthy, Treatise author Gilson, and the *Restatement of Unfair Competition* are correct, Opposer's claimed mark must have acquired secondary meaning before the filing of the Application. Opposer does not even make a serious attempt to demonstrate this. At the very least, there are disputed issues of material fact sufficient to defeat Opposer's motion for summary judgment.

If, on the other hand, Opposer's position – for which there is no authoritative support – that personal name marks are inherently distinctive and become valid upon first use is correct, then Opposer trumps Applicant's filing date, but succumbs to Applicant's even earlier use. At the very least, there are disputed issues of material fact sufficient to defeat Opposer's motion for summary judgment.

Accordingly, Opposer's motion must be denied.

Respectfully submitted,

FISH & RICHARDSON P.C.

Dated: July 1, 2005

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Attorneys for Applicant,
CREATIVE ARTS BY CALLOWAY, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing APPLICANT'S MEMORANDUM IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT, and the supporting declarations of Cabella Calloway Langsam and Joel D. Leviton, have this 15 day of July 2005 been mailed by prepaid first class mail to the below-identified Attorney at his/her place of business:

Barbara A. Solomon, Esq.
Evan Gourvitz, Esq.
Fross Zelnick Lehrman & Zissu, P.C.
866 United Nations Plaza
New York, NY 10017

Cynthia J. Jenghader

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 75761159
Mark: CAB CALLOWAY
Applicant: CREATIVE ARTS BY CALLOWAY, LLC

----- x

CHRISTOPHER BROOKS,	:	
	:	
Opposer	:	
	:	
v.	:	Opposition No. 91160266
CREATIVE ARTS BY CALLOWAY, LLC,	:	
	:	
Applicant.	:	

-----x

**DECLARATION OF CABELLA CALLOWAY LANGSAM
IN SUPPORT OF APPLICANT'S OPPOSITION TO
OPPOSER'S MOTION FOR SUMMARY JUDGMENT**

I, Cabella Calloway Langsam, declare under penalty of perjury:

1. I am the daughter of Cab and Zulme Calloway. Zulme was Cab Calloway's second wife. I was born on October 11, 1952.
2. My father, Cab Calloway (born Cabell Calloway, III), was born in 1907. Cab Calloway's unique musical style and cheerful personality won him a place in the hearts of fans throughout the United States and the rest of the world. My father began performing in his teens. He was a drummer in a Baltimore jazz band during his high school years and later joined a national tour of a Broadway production. After traveling across the country, my father ended up in Chicago where, in 1929, he became the leader of his first band. Cab Calloway began emerging as a jazz luminary in 1930 when his band filled in for the Duke Ellington Orchestra at the Cotton Club, Harlem's premier nightclub. My father's band became quite popular at the Cotton Club

and soon Cab Calloway's Cotton Club Orchestra took its place as the club's house band. Radio broadcasts of Cab Calloway's Cotton Club Orchestra helped propel my father to stardom. During the 1930s and '40s, my father's band included many legendary jazz players including Dizzy Gillespie. During the 1950s, my father starred in George Gershwin's Broadway musical "Porgy and Bess." He also starred in other Broadway productions including "Hello Dolly" and "The Pajama Game." My father's talent touched a new generation in 1980 when he was featured in the hit movie "The Blues Brothers." In the 1990s, my father appeared on Sesame Street as well as in Janet Jackson's music video for her song entitled *Alright*.

3. Over the course of my father's 60-year career, he authored or co-authored over one hundred compositions including the hit *Minnie the Moocher*, which features the popular "hi-de-hi-de-hi-de-hi / ho-de-ho-de-ho-de-ho" refrain. My father also released numerous records and record albums of his recorded music, many of which are still in circulation today. Attached hereto as Exhibit 1 are true and correct depictions of the packaging for various Cab Calloway recordings.

4. Cab Calloway was an inspired composer, performer, and band leader. He was very particular about his art, always striving to achieve a particular sound in his works. He worked tirelessly with his bands to create his unique style of jazz, and was incredibly meticulous about how his songs were performed and recorded. He had an uncanny ability to make his bands animated and dynamic, as he artfully brought the various band sections to life. In fact, he earned his first band leader position by jumping in as a band's "leader" when the actual leader was taking a break from rehearsal. The sound my father yielded from this band was so different and lively, my father eventually became the band's leader.

5. Cab Calloway treated his artists with great respect, took excellent care of them, and paid them well and on time. In addition, he was a strict disciplinarian, which earned him the nickname "Fess" – short for Professor – by his band members because of his rigorous work ethic and exacting standards.

6. In addition to his tremendous musical contributions, my father introduced "jive" into the American vernacular literally changing American culture forever. He authored the first Hepster's Dictionary, which is a dictionary of jive terms. See Exhibit 2. My father was famous for his revolutionary combination of jive talk with scat singing.

7. My father's reputation as an international jazz icon was acknowledged throughout his life in ways too numerous to detail. The following are just a few examples of the recognition and celebrity he received: (1) he was awarded the National Medal of Arts by President Clinton in 1994; (2) he was posthumously inducted into the International Jazz Hall of Fame; (3) in 1985, then Mayor of New York City, Ed Koch, presented a tribute to my father; and (4) he received numerous letters and commendations from fans and dignitaries, including a letter from the Governor of the State of New York in 1977 describing Cab Calloway as "one of our most distinguished citizens." See Exhibit 3.

8. Because I was living in Delaware, my parents frequently visited me there and eventually moved from New York to Delaware, where my father died in 1994. In 1993, Cab Calloway became involved with the Creative and Performing Arts Middle School in the Red Clay Consolidated School District. Cab Calloway gave his time, talent and love to this school to encourage and foster the development of musical and creative talents of the young students of the school. Cab Calloway even participated in the ribbon-cutting ceremony for the school. See Exhibit 4.

9. In recognition of Cab Calloway's involvement with the school and to honor his status as an international jazz icon, the Red Clay School District sought Cab Calloway's permission to name the school "Cab Calloway School of the Arts." Cab Calloway authorized the school to use his name as the name of the school.

10. Since October 1993, when The Red Clay Middle School for Creative and Performing Arts was renamed "Cab Calloway School of the Arts", the school has continuously

operated under the name Cab Calloway School of the Arts, often abbreviated and referred to as "Cab Calloway" by school officials, students, and the community at large. See Exhibit 5.

11. Since at least 1994, the Cab Calloway School of the Arts has used CAB CALLOWAY as a service mark in connection with the production and presentation of theatrical plays and musical performances. Cab Calloway School of the Arts regularly performs musical concerts and theatrical plays both at the school and in a variety public venues. For example, Cab Calloway School of the Arts performing groups were chosen to sing before thousands of people in the Cathedral of St. John the Divine in Harlem at a memorial service in Cab Calloway's honor. The Cab Calloway School of the Arts performing groups have also entertained Hillary Rodham Clinton, performed with Bob McGrath from the original cast of Sesame Street, represented the State of Delaware with their dancing and singing at The Kennedy Center in Washington D.C., and have also worked with various world renowned musical artists. Attached hereto as Exhibit 6 are true and correct copies of news articles demonstrating the use of the CAB CALLOWAY service mark in connection with the production and presentation of musical and theatrical performances.

12. Cab Calloway and his successors in interest also authorized the Cab Calloway School of the Arts to sell various clothing items, school supplies, and other products bearing the CAB CALLOWAY mark. Cab Calloway School of the Arts currently sells clothing items and has done so since at least as early as 1994 pursuant to its license from Cab Calloway and his Estate to do so. See Exhibit 7.

13. From 1992 to 1994, I was the President of the Board of Directors of the Cab Calloway School of the Arts. Since that time I have been and continue to be an honorary member of the Board of Directors, as has my mother.

14. Another way my father's reputation has been recognized is through a \$250,000 scholarship fund set up by MBNA in my father's honor to provide talented and deserving Cab Calloway School of the Arts' students the opportunity to enrich and augment their experience and

learning of the arts during the summer months. Since 1995, this scholarship has been awarded to over 268 students. See Exhibit 8.

15. When Cab Calloway passed away in 1994, he bequeathed to my mother, Zulme, all his property, real personal and mixed, of whatever kind "including all royalties and residuals or other payments or rights to payment for the reproduction of my performances or any songs or lyrics or both in which I have any ownership or other rights" as well as all intellectual property rights he possessed. See Exhibit 9.

16. After my father passed away, we founded the Cab Calloway Foundation in 1995 to honor his legacy and to promote the arts and education. I am Chief Executive Officer of the Cab Calloway Foundation. Attached hereto as Exhibit 10 is a true and correct copy of the program distributed to attendees of the Cab Calloway Foundation Kick-off, which took place at Planet Hollywood in New York City in 1997.

17. In December 2000, my mother, my sister Chris Calloway, my husband and I formed Creative Arts by Calloway, LLC (hereinafter "CABC") to manage, promote, license and otherwise deal with the rights associated with the name, likeness, voice, and intellectual property rights belonging to Cab Calloway. I am the Managing Partner of CABC. My mother assigned all of her interests in my father's intellectual property, including all trademarks and service marks and associated goodwill, to CABC. See Exhibit 11.

18. One of CABC's predecessor in interest, Calloway Entertainment, granted a trademark license to Gear Ink to manufacture and sell T-shirts bearing the CAB CALLOWAY trademark. Gear Ink currently submits royalty checks to CABC as consideration for this license, and it has been sending such checks to my mother since at least 1996. See Exhibit 12.

19. As set forth above, CABC by and with its predecessors in interest and affiliated entities, has used the CAB CALLOWAY mark in connection with a variety of goods (e.g., sound recordings, clothing, and school supplies) and services (e.g., production and presentation of musical and theatrical performances, educational services, and scholarship awards) since long prior to Opposer's first use of THE CAB CALLOWAY ORCHESTRA.

I declare under penalty of perjury that the foregoing is true.

Executed this 24 day of June, 2005.

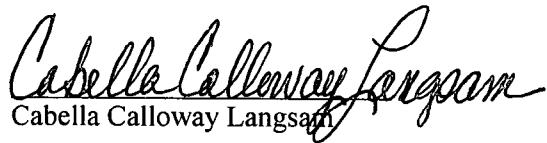
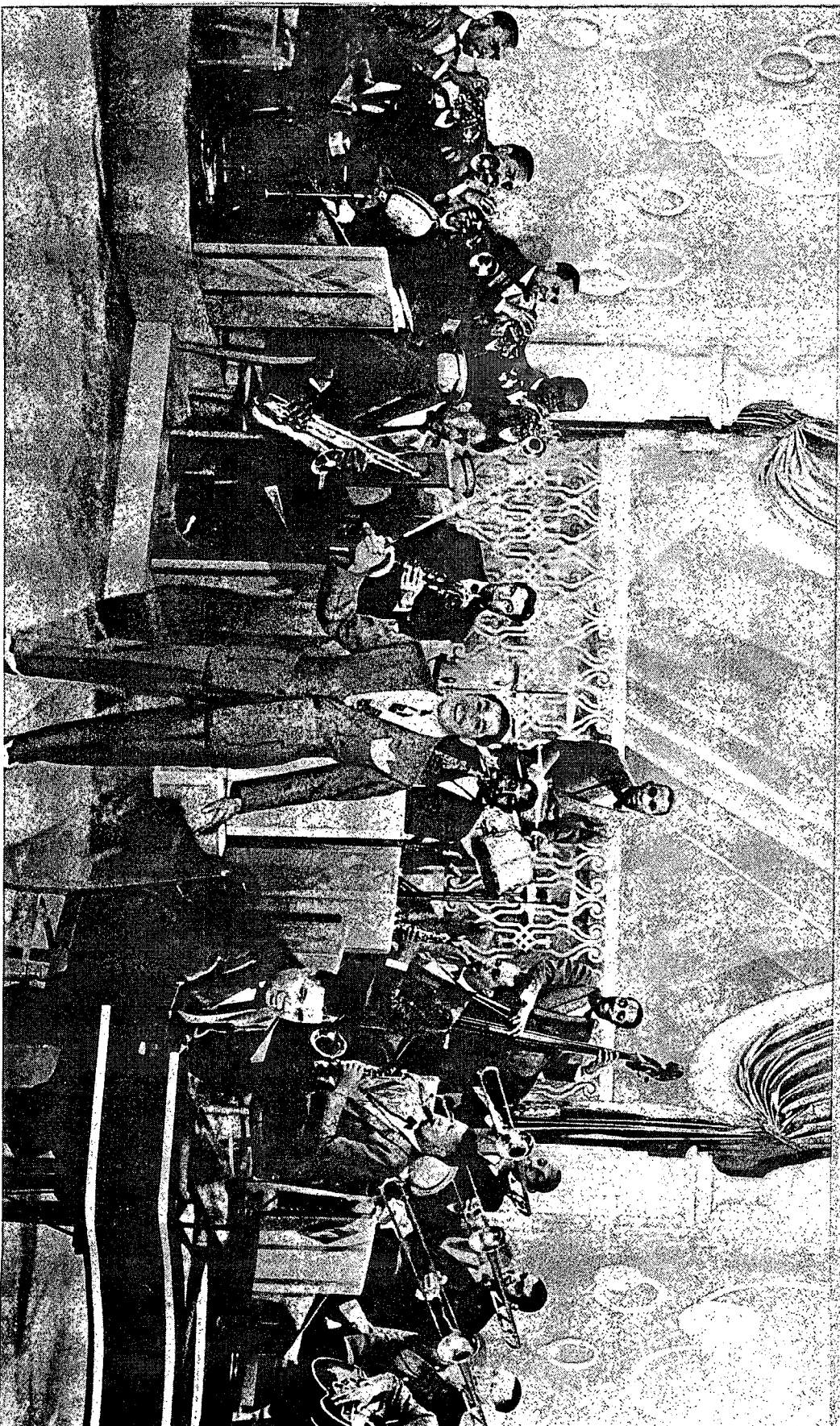

Cabella Calloway Langsam

EXHIBIT 1

CAB CALLOWAY

AND HIS ORCHESTRA

"JUMPIN' STUFF"



CAB CALLOWAY AND HIS ORCHESTRA

"JUMPIN' STUFF"

SIDE ONE

- 1 AIR MAIL STOMP 2:56
- 2 ONE O'CLOCK JUMP 5:27
- 3 LAMARR'S BOOGIE 3:28
- 4 BASCALLY BLUES 3:17
- 5 JEALOUS 3:40

SIDE TWO

- 1 GET WITH IT 3:36
- 2 JUMPIN' STUFF 2:43
- 3 FRANTIC IN THE ATLANTIC 3:54
- 4 BLUE SKIES 1:34
- 5 LIMEHOUSE BLUES 2:17
- 6 ZANZIE 3:34

PERSONNEL:

TRUMPETS: Lamarr Wright, Jonah Jones, John Letman,

Paul Webster

TROMBONES: Keg Johnson, Quentin Jackson, James Buxton,

Earl Hardy

SAXOPHONES: Hilton Jefferson, Charles Frazier, Rudy Powell,

Al Gibson, Sam "The Man" Taylor

PIANO: Dave Riviera.

GUITAR: John Smith

BASS: Milt Hinton

DRUMS: Panama Francis



THE DYNASTY CENTRAL



JAM - R - Z - D - V - E

Superb Live Performances

More and More Available



ELECTRONICALLY
RE-RECORDED TO
SIMULATE STEREO

HIDE HO MAN CAB CALLOWAY CLASSICS





EVERYBODY EATS WHEN THEY COME TO MY HOUSE
TWO BLOCKS DOWN, TURN TO THE LEFT
THE CALLOWAY BOOGIE
HEY NOW - HEY NOW
ST. JAMES INFIRMARY
I'LL BE AROUND
HI DE HO MAN
OH GRANDPA
JUMPIN' JIVE
HOY HOY



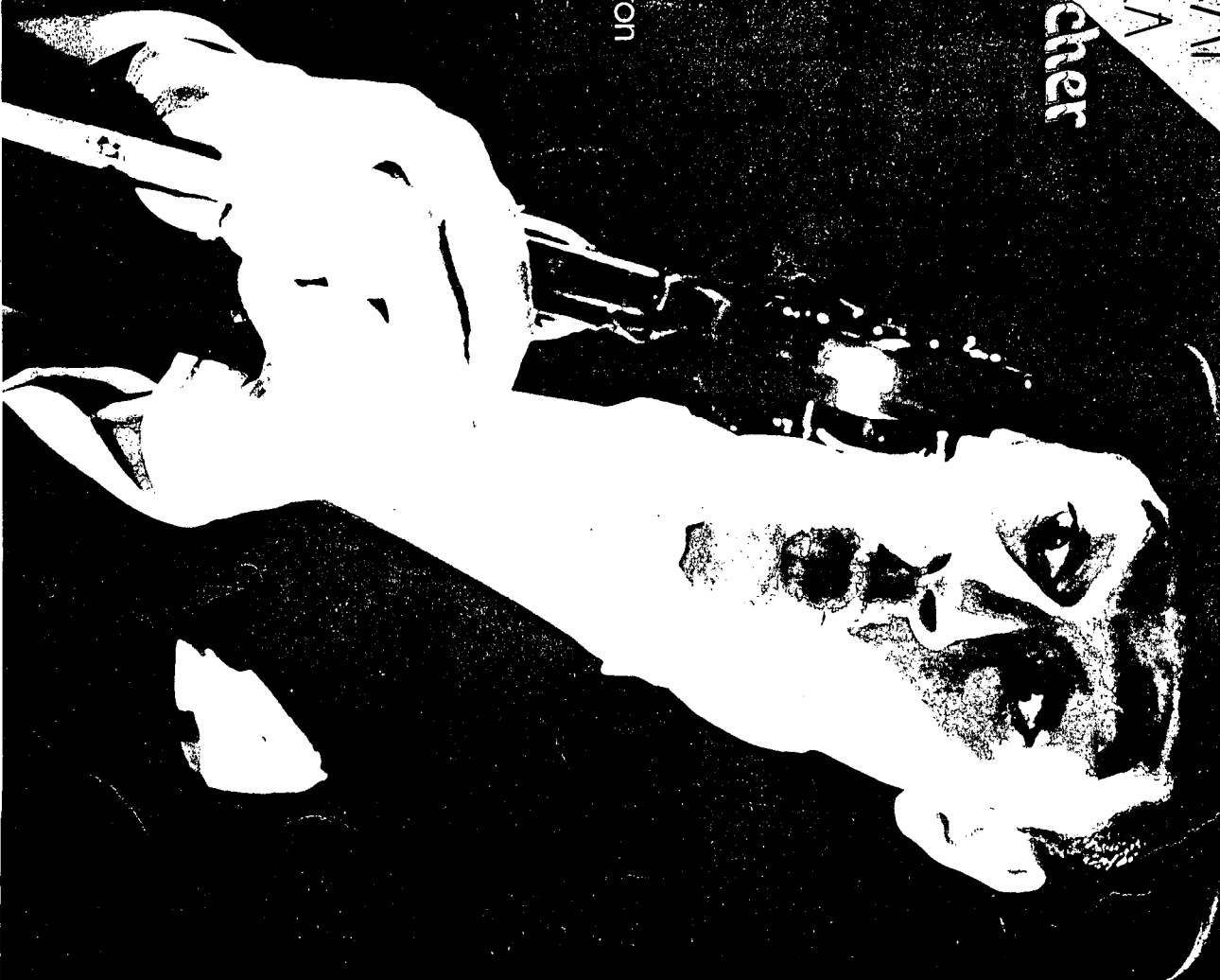
CAB CALLOWAY
& HIS ORCHESTRA

Minnie the Moocher

1933-1934
recordings

Lady With a Fan
Harlem Camp Meeting
Zah Zuh Zah
There's a Cabin in the Cotton
Hotcha Razz-Ma-Tazz

kid
Calloway



Side One

Harlem Hospitality (Van Housen-Alton) **Lady With a Fan** (Calloway-Burns-Stockman)
Harlem Camp Meeting (White) **Zeh Zuh Zah** (Calloway-White)
Father's Got His Glasses On (Swoyze)
Little Town Gal (Burns)
There's a Cabin in the Cotton (Barish-Barkins)
The Scot Song (Calloway)

To the skeptic and the cynical, it must seem positively daft that an already impressive number of young people should be checking out the music of the likes of Louis Jordan and Cab Calloway these days. And, moreover, reacting in a positive and genuinely enthusiastic-plus way. After all, what could be more unbelievable than for an established

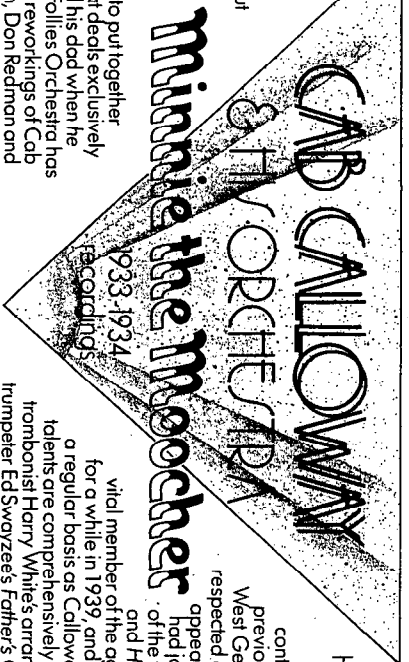
singer like Joe Jackson forsaking rock in order to put together his Jumpin' Jive, an excellent six-piece band that deals exclusively with the kind of irresistible music that so excited his dad when he was a teenager. And that's not all. The Midnight Follies Orchestra has for a few years now been featuring its own fine reworkings of Cab Calloway material (as well as tunes by Ellington, Don Redman and Sam Wooding), while talented British female vocal groups like Sweet Substitute and the Notion Sisters have been known to include songs of the 1920s, 1930s and 1940s within their repertoire. All of which makes it absolutely certain that something of a genuine revival of this brand of happy, uplifting music is well and truly with us – and without, thank goodness, your actual nostalgia-for-my-faded-youth reasons which sometimes is the primary cause for bringing back into contemporary focus music of the past...

All of which must make Cabell 'Cab' Calloway smile. Smile with pleasure, of course, because the music he more than most helped bring to the forefront 40-50 years ago should suddenly be popular with the youth of the early-1980s. Smile, too, about the rebellious qualities in much of today's younger generations. For Cab himself was something of a youthful rebel, and he was lecturing songs about smoking, unconventional cigarettes decades before it became the fashionable thing to do (Calloway aficionados will need little reminding that Cab and his orchestra recorded *The Viper's Drag*, 'way back in 1930). And although Calloway recordings never even remotely approached the astronomic sales of the top rock groups/soloists of the past 20 years, he, too, has had hit records. As that fountainhead of musical knowledge, and good friend, Fred DeRosa reminded this writer recently, the Calloway band's 1942 recording, for OKeh, of *Blues in the Night* went as high as eighth place on the US Charts; in more recent times Calloway's *Little Child* (ABC-Paramount) did modestly well in the States in 1956, likewise *History Repeats Itself* (Boon) ten years later.

And if it's a larger-than-life personality you're after, then His Highness of Hi-De-Ho fits the bill with consummate ease. Calloway was also one of the first from a basically jazz genre to use his own brand of hepster's language, bringing new – and, at times, seemingly untranslatable – terminology into fairly widespread use. And Calloway's career has encompassed bandleading, singing, playing, writing, dancing and acting. For example, his singing-acting in *"Porgy & Bess"* – both on Broadway and on the London stage – has made his *Sportin' Life* one of the very best. And it should come as little surprise to learn that a non-singing Cab Calloway registered solidly in a time Steve McQueen-Edward G. Robinson movie, *"The Cincinnati Kid"* (1951).

In more recent times, his top starring role, opposite Pearl Bailey, in an all-black Broadway revival of *"Hello, Dolly!"*, and a guest appearance in the film *"The Blues Brothers"* have given lie to the claim by some that the older an entertainer gets the quicker his talent dissipates. For although for some years now he's claimed to be living in semi-retirement, Cab seems to pop up again – at a jazz festival or a TV spot – just when you think he's decided already to give it all up for good. Which would be a natural thing to do – after all, he's fast approaching 74 years young this December. Except that Calloway, like other elderly statesmen of music, never even thinks about total retirement...

However popular in practically any of his many roles, for most people it is as a successful singing bandleader that he will be remembered for all time. For since the beginning of the 1930s he has led a series of always interesting bands, right up until the final outfit which he disbanded in 1948. Through that long period, musicians of the calibre of Ben Webster, Dizzy Gillespie



Side Two

Mimie the Moocher (Calloway-Mills) **Kickin' the Gong Around** (Kochler-Alton)
Long About Midnight (Mills-Hill) **Moon Glow** (Hudson)

Morgie (Davis-Carned-Russell-Robinson)
Jitter Bug (Swoyze-Calloway)
Hotcho Kazz-Mo-Tazz (Kazak-Mills-Hudson)

contained on both sides of this album – previously available many years ago only in West Germany. For Eddie Barefield, a highly-respected altoist and clarinetist as well as writer, appears throughout in all three capacities. He had joined Calloway just before the recording of the two earliest numbers – *Little Town Gal* and *Harlem Hospitality* – and was to remain a

vital member of the aggregation until 1936. He rejoined Cab for a while in 1939, and during the 1950s was to be occupied on a regular basis as Calloway's musical director. Barefield's writing talents are comprehensively on show throughout this LP – apart from trumpeter Ed Swoyze's *Father's Got His Clothes On*, probably all the other charts are Barefield's. And Barefield's soft-toned saxophone work is liberally distributed throughout this fascinating collection of recordings made in the years 1933 and 1934, including the altoist's favourite own solo with Calloway – a delightful contribution to the Will Hudson-Eddie DeLange standard *Moonglow*, the only non-vocal track of the 15.

Elsewhere, there are fine individual solos from the Hawkins-influenced tenor-sock of Walter 'Foots' Thomas (a member of the band from its inception, remaining until 1943); the afore-mentioned trumpeter White; baritoneist Andrew Brown (featured on *Morgie* only); trumpeters Swoyze and Lammar Wright; pianist Bernie Raine (also helping out as extra vocalist on *There's A Cabin in the Cotton*); and Eddie Barefield, again, this time as clarinetist. Up-front, of course, is the slightly outrageous, positively inimitable Cabell Calloway. Whether he's telling the sad story of a Chinese gentleman called Smokey Joe (Zaz Zu Zaz – with further references to be found in the bluesy *Kickin' the Gong Around*), or giving forth with his own brand of scat-singing (e.g. *Father's Got His Clothes On*, and the self-explanatory *The Scot Song*), or indulging in a delightful mock-serious vocal exaggeration (*Morgie*), there's no doubting his abilities as the focal point of attraction. And when Cab is singing his own *Mimie the Moocher*, you've got just about the archetypal Calloway performance for all time.

In inviting you to pay keen attention to the contents of this album, perhaps one should use the language of Calloway himself, as defined in his own *Hepster's Dictionary*: "Whether you're a queen – or even a cool V-8 – or merely a jack, may we invite you to bust your conk to place this platter on your record deck of once. When you do, you'll hear these Calloway cats beat out the groovest sounds. 'Cos when they play, the joint is jumpin'. The music is kopselick! You'll blow your wig. And if you wanna lay some iron... well, do it, jack – you don't have to be a rug-cutter. You don't have to wear your finest drogues to make this scene – a yarddog, with nothin' more than a dreamer can still make it. But if it's Mambovani or Mot The Hoopie you're into, then it's gotta be neighgo, pops..."

Stan Britt ("Jazzlink")

Which, roughly translated, means: Whether you're a lovely lady – or just a guy who keeps the staff in line – or merely a cool, you've moved closer to your next record. Now then, the musicians collectively produce some real, real, real excitement. And if you'd care to execute some jazz, you'll find it all in the best kind of a way... well, go ahead – you don't have to lay down or a little thing. I mean, if you're a high class gal, dressed in the best kind of a suit, or just a happy, at ease, wearing nothing more than a bikini, it makes no difference. But if you're the most fashionable of modern fashions, then don't waste your time – nothing doing, dot...!

Lammar Wright, Doc Cheatham, Edwin Swoyze, Jr., DeFries Wheeler, Harry White, Imb, Eddie Barefield, c. as arr. Andrew Brown, as bars; Arville Harris, Walter Thomas, ls. cl.
 Bernie Raine, pno; Morris White, gr. bjo; Al Morgan, b; Leroy Moorey, dr. Cab Calloway, ld, voc.
 77697-2 *Little Town Gal* (voc. Cab Calloway)
 77699-1 *Harlem Hospitality* (voc. Cab Calloway & Band)
 78503-1 *The Lady With the Fan* (voc. Cab Calloway & Band)
 78504-1 *Harlem Camp Meeting* (voc. Cab Calloway & Band)
 78505-1 *Long About Midnight* (voc. Cab Calloway)
 81089-1 *Moonglow* (voc. Cab Calloway)
 81090-2 *Jitter Bug* (voc. Cab Calloway & Band)
 78868-2 *Kickin' the Gong Around* (voc. Cab Calloway & Band)
 78869-1 *There's A Cabin in the Cotton* (voc. Cab Calloway, Bernie Raine)
 81088-1 *Long About Midnight* (voc. Cab Calloway)
 81089-1 *Moonglow* (voc. Cab Calloway)
 81090-2 *Jitter Bug* (voc. Cab Calloway & Band)

ଗୋ-ଡ଼ାମା ଓ ଚିକିଟ୍



**CAB
CALLOWAY**

And his
COTTON CLUB ORCHESTRA

HI DE-HI HO-DE-HO!

**Three Of The
Best Known
Swing-Personalities
1936 = 1940**



NOW **ON STAGE**

ELLA FITZGERALD

FIRST LADY OF SWING

AND THE FAMOUS CATTY WALKER

CAB - ELLA & CHICK

7125

SIDE ONE Cab Calloway & His Orchestra

1. Swing, Swing, Swing 2:38
2. That Man is Here Again 2:34
3. The Ghost of Smoky Joe 2:43
4. Azure 2:42
5. Shout, Shout, Shout 2:32
6. She's Tall, She's Tan, She's Terrific 2:29
7. Floogie Walk 2:15

During the swing years, three of the best remembered personalities were Cab Calloway, Chick Webb, and the great Ella Fitzgerald. Chick Webb passed away a long time ago, but Cab and Ella are still with us.

The Calloway recordings featured here have to be considered some of his rarest performances, and have not been heard in many years. They feature some of the giants in jazz paying their dues as sidemen in Calloway's band. Some of the great ones featured here are Claude Jones and Keg Johnson on trombone, Ben Webster and Chu Berry on tenor sax, Milt Hinton on bass, and, of course, Cab Calloway on all the vocals. Swing, Swing, Swing has a very short vocal by Cab and could almost be considered an instrumental. The tune That Man is Here Again was a novelty that will remind anyone who remembers radio back in the thirties of Al Pearce, the comedian who was always saying "Oh! Yeah . . . Oh! Yeah . . ."

Of course, The Ghost of Smoky Joe was one of the more familiar things that Cab sang; also there's an unusual version of Ellington's Azure complete with lyrics and some fine saxophone section work.

Shout, Shout, Shout is a medium paced instrumental and Floogie Walk features a high spirited trumpet solo, probably Lammar Wright. Chu Berry is heard briefly on Shout, Shout, Shout and the Tail, Tan, Terrific opus.

Chick Webb started his drumming career back in the twenties and arrived with a band in Harlem at the Savoy Ballroom in 1927. The group group was known as "The Harlem Stompers." In 1934 or 35 Ella Fitzgerald was found singing at an amateur contest and was hired by Ali Bardu, a performer who worked with the Webb orchestra. Webb had an ear for talent and started featuring his young girl singer heavily. As time went by, Chick Webb started giving Ella equal billing and the orchestra gained wide popularity. In 1939 Chick Webb passed away from tuberculosis of the spine. After his death, the band continued under the nominal leadership of Ella Fitzgerald for over two years, with Ted McRae and then Eddie Barefield as musical directors. Without Webb, though, it had lost its vital spark and the final break-up was inevitable. Ironically the two numbers on this album that feature Ella as the leader of the band are both instrumentals. The vocals presented here are some of Ella's earliest efforts, and show off her great phrasing and ease at handling the most trite material. Cryin' Mood in this producer's opinion is one of the best vocals Ella ever did with the Chick Webb band. Fitzgerald fans will recall You'll Have To Swing It as Mr. Pagini, which she recorded again in the 50's. The great horn work of Sandy Williams is heard throughout the album; his best solo is on the instrumental number, Lindy Hoppers Delight.

Kirk De Grazia
Bandstand Records

SIDE TWO Chick Webb & His Orchestra featuring Ella Fitzgerald

1. Lindy Hoppers Delight 2:47
2. Sing Me A Swing Song 2:32
3. When I Get Low, I Get High 2:24
4. Cryin' Mood 2:33
5. Everybody Step 2:37
6. Jubilee Swing 3:13
7. You'll Have To Swing It 2:55

PERSONNEL INFORMATION CAB CALLOWAY & HIS ORCHESTRA 1937-1939

March 3rd 1937

Shad Collins, Irving Randolph, Lammar Wright (tps); Claude Jones, Keg Johnson, De Priest Wheeler (tbs); Garvin Bushell, Andrew Brown, Ben Webster, Walter Thomas (reeds); Bennie Payne (p); Morris White (g); Milt Hinton (sb); Leroy Maxey (d); Cab Calloway (vocals).

1. That Man is Here Again (vocal)

2. Swing, Swing, Swing (vocal)

Chu Berry replaces Webster (sax)

3. She's Tall, She's Tan, She's Terrific Act 24th 1937

Chauncey Haughton replaces Bushell (reeds)

March 23rd 1938

4. Azure (vocal)

August 30th 1938

Cozy Cole replaces Maxey (d); Edgar Battle (arr); Danny Barker replaces White

March 28th 1939

5. Shout, Shout, Shout (instrumental)

6. The Ghost of Smoky Joe (vocal)

7. Floogie Walk (instrumental)

CHICK WEBB & HIS ORCHESTRA featuring ELLA FITZGERALD 1936-1940

April 7th 1936

Mario Buza, Bobby Stark, Tatt Jordan (tps); Sandy Williams, Nat Story (tbs); Pete Clark, Louis Jordan, Ted McRae, Wayman Carver (reeds); Tommy Fulford (p); John Trueheart (g); Beverly Peer (sb); Chick Webb (d); Ella Fitzgerald (vocals).

1. When I Get Low, I Get High (vocal)

2. Sing Me A Swing Song (and let me dance) June 2nd 1936

3. (If You Can't Sing It) You'll Have To Swing It Oct 29th 1936

Charlie Dixon (arr)

4. Cryin' Mood March 24th 1937

Chauncey Haughton replaces Clark (reeds); Bobby Johnson replaces Trueheart (g).

5. Everybody Step June 9th 1938

After the death of Chick Webb in July of 1939, Ella Fitzgerald takes over the leadership of the band, and was billed as Ella Fitzgerald and Her Famous Orchestra.

ELLA FITZGERALD AND HER FAMOUS ORCHESTRA 1939-1940

Dick Vance, Bobby Stark, Tatt Jordan (tps); George Matthews, Nat Story, Sandy Williams (tbs); Garvin Bushell, Hilton Jefferson, Wayman Carver, Ted McRae (reeds); Tommy Fulford (p); John Trueheart (g); Beverly Peer (sb); Bill Beason (d); Ella Fitzgerald (vocals)

The original 78 recordings were used to produce this album. They were carefully cleaned and played back with the best sounding group of different stylized cartridges. They were then transferred to a master tape and recorded at 15 inches per second to enable engineers to remove the many ticks and pops which were sometimes present in the original material. Whenever possible, surface noise has been minimized, but never where it adversely affects the quality of the music itself.

Engineered by Cecil Spiller and Kirk De Grazia
Cover Art by Kirk De Grazia

BLANCHE AND CAR CALLICORAY
HARLEM HOSPITALITY

1941-54

BLUEBIRD



Blue Bird

Electrically
PHONOGRAPH
Recorded
RECORDS

HARLEM HOSPITALITY
Cab Calloway and his Cotton Club Orchestra/Blanche Calloway and her Jay Boys
Produced by Frank Driggs

SIDE A

- ✓ EVENIN' (Recording Date: 8/18/33) (2:45)
- ✓ LITTLE TOWN GAL (9/27/33) (3:15)
- ✓ HARLEM HOSPITALITY (9/27/33) (2:35)
- ✓ LADY WITH THE FAN (11/2/33) (3:15)
- ✓ HARLEM CAMP MEETING (11/2/33) (3:05)
- ✓ ZAN ZUM ZAZ (11/2/33) (3:25)
- ✓ FATHER'S GOT HIS GLASSES ON (11/2/33) (3:05)
- ✓ MINNIE THE MOOCHER (12/18/33) (3:34)

SIDE B

- ✓ THE SCAT SONG (12/18/33) (2:40)
- ✓ KITCHEN THE GONG AROUND (12/18/33) (3:22)
- ✓ THERE'S A GIN IN THE COTTON (12/18/33) (3:28)
- ✓ LONG ABOUT MIDNIGHT (11/23/34) (3:05)
- ✓ JITTERBUG (11/23/34) (3:07)
- ✓ MOON GLOW (11/23/34) (3:09)
- ✓ HOT CHOCOLATE TAZZ (11/23/34) (3:12)
- ✓ MARGIE (11/23/34) (3:07)

SIDE C

- ✓ EMALINE (11/20/34) (2:50)
- ✓ THERE'S RHYTHM IN THE RIVER (12/2/31) (3:40)
- ✓ ALL I NEED IS LOVIN' (12/2/31) (2:40)
- ✓ JUST A CRAZY SONG (HI HI HI) (12/2/31) (3:01)
- ✓ SUGAR BLUES (12/2/31) (3:02)
- ✓ I'M GETTING MYSELF READY FOR YOU (12/2/31) (3:02)
- ✓ LOVELESS LOVE (12/2/31) (2:57)
- ✓ MISERY (12/2/31) (3:22)

SIDE D

- ✓ IT'S RIGHT HERE FOR YOU (5/8/31) (2:02)
- ✓ MAKE ME KNOW IT (If You Mean What You Say) (6/11/31) (2:27)
- ✓ IT LOOKS LIKE SUSIE (6/11/31) (3:09)
- ✓ WITHOUT THAT GAL (6/11/31) (3:41)
- ✓ I GOT WHAT IT TAKES (Birth Breaks My Heart (Takes It Away)) (11/18/31) (3:55)
- ✓ I'M GROWIN' IN DAY (11/18/31) (3:13)
- ✓ CONCENTRATING ON YOU (11/18/31) (3:14)
- ✓ BLUE MEMORIES (11/18/31) (3:18)

CAB CALLOWAY

and his Orchestra

“Swinging 40s”



CAB CALLOWAY and his Orchestra

"Swinging 40s"

trumpets	Jonah Jones Shad Collins Russell Smith or Irving Randolph Paul Webster or Lamar Wright
trombones	Reg Johnson Claude Jones or Tyree Glenn DePrieste Wheeler or Quentin Jackson
alto-saxes	Chauncey Haughton or Hilton Jefferson Jerry Blake or Andy Brown
tenor-saxes	Al Gibson or Teddy McRae Ike Quebec or Walter Thomas
bariton sax	Greely Watson or Rudy Powell
piano	Bennie Payne or Dave Rivera
guitar	Danny Barker
bass	Milton Hinton
drums	Cozy Cole or J.C. Heard or Buford Oliver

SIDE 1 * RUSSIAN LULLABY July 30, 1945

9:20 SPECIAL -
THE VERY THOUGHT OF YOU Sept 22, 1944
POO A LITTLE BALLY-HOO -
IS YOU IS OR IS YOU AIN'T MY BABY -
FRANTIC IN THE ATLANTIC -
BLUE SKIES -

SIDE 2 * BOJANGLES STEPS IN "Stormy Weather", 1943

EASY JOE -
AIN'T THAT SOMETHING -
EVERYBODY DANCE -
THE HONEYDRIPPER Nov 13, 1945
LET'S GO JOE July 27, 1942
THE JUMPIN' JIVE July 17, 1939

Brunswick ★



**CAB CALLOWAY
AND HIS ORCHESTRA**

**In a group of the original recordings that
made him world-famous**

**MINNIE THE MOOCHER
KICKIN' THE GONG AROUND**

**ST. LOUIS BLUES
BUGLE CALL RAG** ★

**YOU RASCAL YOU
SOME OF THESE DAYS**

**ST. JAMES INFIRMARY
NOBODY'S SWEETHEART**



BRUNSWICK COLLECTORS' SERIES



Album No. B-1004

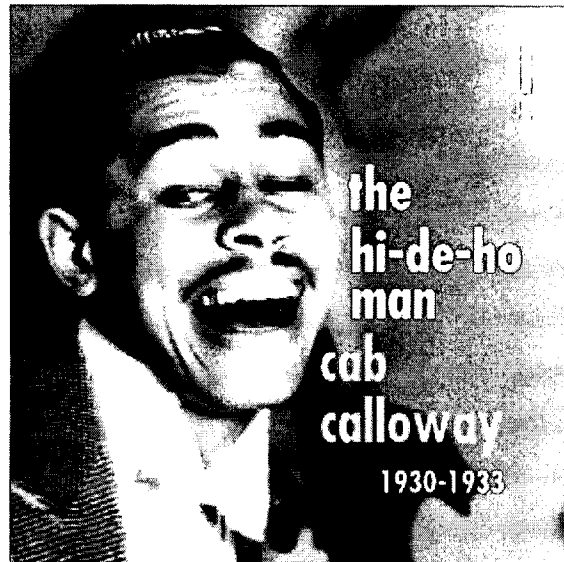
CAB CALLOWAY

★ ARE YOU ★
★ HEP ★
★ TO THE ★
★ JIVE? ★



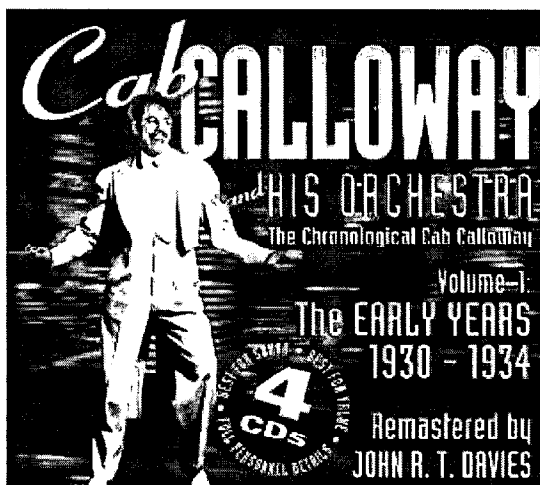
22 Sensational tracks!

RHYTHM and SOUL | **LEGACY** SERIES



the
hi-de-ho
man
cab
calloway

1930-1933



Cab CALLOWAY

HIS ORCHESTRA

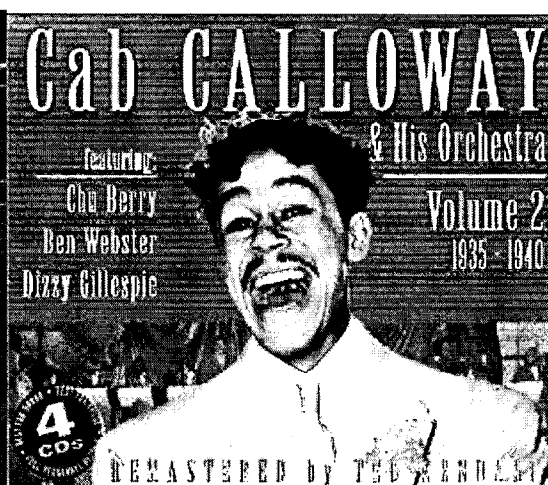
The Chronological Cab Calloway

Volume-1:

The EARLY YEARS
1930 - 1934

4
CDS

Remastered by
JOHN R. T. DAVIES



Cab CALLOWAY

& His Orchestra

Featuring:

Chu Berry

Ben Webster

Dizzy Gillespie

Volume 2

1935 - 1940

4
CDS

REMASTERED BY THE MANDATORY

CAB CALLOWAY

MINNIE THE MOOCHER



THE MOOCHER
MOPIN' JIVE
MONEY DRIPPER
THE CALLOWAY BOOGIE
and more

1935
ORIGINAL CDS
REMASTERED

EXHIBIT 2

ME

say I was ornery and
when I was young I
who could take me in a
at for my buddies in the
oman in every city and
rainy days and one for

rs. Buddy, they haven't
thes. I did it all. And do
nen. It's called living.
cooher, knows all about
f life. It's making people
I feel it and as I've lived
ee thousand people and a
ts, and you can't give me
ice that's really with me.
nging. Let me hear them
ached the people with my
t people out there have for
o follow your dreams and
e with your emotions and
le know that there ain't no
o live it to the hilt. But it
soul and sing your friggin'



The
NEW
CAB
CALLOWAY'S
HEPSTERS DICTIONARY

LANGUAGE OF JIVE
1944 EDITION

Copyright 1944 by Cab Calloway, Inc.

EXHIBIT 3

AWARDS GIVEN TO CAB CALLOWAY

"A Tribute to Black Women" Appreciation Plaque	1983
Aging in America President's Award	1984
ASCAP Duke Ellington Award	1988
Award of Merit and Honory Fellowship from the George Washington Carver Institute	1954
Black Business Association Award	1981
Black Film Makers Hall of Fame	1982
Black Oscar Pioneer Award	1991
Cab Calloway School of the Arts	1993
Caesar Palace, Atlantic City Legends of Racing Cup	1989
Certificate of Appreciation, Mayor Hoch, New York	1985
Citation from City of New York	1992
Citation from National Academy of Popular Music	1991
Citation from the City of Dallas TX	1980
City of Baltimore Pewter plate presentation	
City of Boston citation	1988
City of Hope Award	
City of Log Beach, New York Citation	1987
City of Miami Beach Citation	1987
City of Minneapolis	1954
City of Portland OR. Citation	1992
City of White Plains Award	
City of Wilmington, DE Citation" CAB Calloway Day"	1989
Coastal Jazz Association Plaque	
County of Sonoma, CA. Resolution	1983
Dartmouth Film Society	1987
Diploma of Honor for Artistic merit and identification with youth in Cuba	1949
Doctor of Music Degree, Mercy College, New York	1983
Duke Ellington Memorial Award	1992
Ebony Lifetime Achievement Award	1985
Fashion Designers Award	1968
Flo-Bert Plaque	1992
Fund for Educational Excellence Plaque	1985
George Washington Carver Memorial Institute	1954
Grammy Award	1977
Doctor degree from Morgan State	1986
International Association of Jazz Educators Citation	1990
Key of District of Columbia	1980
Key to City of Omaha, NE	
Key to City of Sacramento CA	

Key to Kansas City, MO	
Key to the City of Savannah , Georgia	
Kitani Foundation Plaque	1982
Life Achievement Westchester, New York Community	
Life time Membership in Al Jolson Society	
Long Beach City College Citation	1985
Los Angeles Bicentennial Commemorative Medal	
Lou Costello Tent Award	
Mamaroneck ,New York Invitational Medal	
Manhattan Association of Cabarets Citation	1985
Member of Ezrath Israel (The Actors Temple)	1965
NAACP Plaque Boston, Branch "Distinguished service"	1981
National Metal of the Arts	1993
National Urban League Award	1972
New England Conservatory of Music Award	1984
New School Film Makers Series Award	1982
New York Racing Association "Remembering Cab"	1995
Office of the Mayor of New York City Citation	1990
Office of the Mayor Of Rochester, New York Citation	1992
Opportunity Programs	1993
Paul Robinson Award	1994
Plaque from Provident Medical Center	1985
Proclamation Manhattan Cab Calloway Day	1976
Rheingold Award "Contributions to the children of of New York	1959
Rochester Philharmonic Plaque	1992
St. Joseph's School of the blind award	1971
Saints and Sinners Plaque	
Society of Singers Inc. Plaque	
St Louis Arch Award	
St. Jude Hospital Citation	
Tamarack Lodge Plaque	1988
Town of Greenburg , New York Citation	1985
Tribute to "Cab" Lehman Center	1985
Trophy "The American Image Hall of Fame"	1984
Trouper Award Plaque	
United Airline 100,000 mile Award	1955
United Way: Life time membership associated with Black Charities	1986
Urban League Award	1987
Westchester Council for the Arts	1983
Westchester Country Distinguish Service Medal	1995
Westchester, New York Citation	
Woman in Politics Award Citation	1975



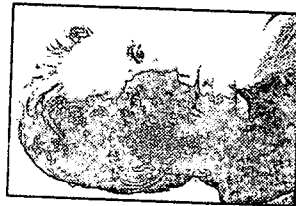
Photo credit: Marshall H. Cohen

1993 National Medal of Arts

(l-r) Leonore Annenberg, patron of the arts; Cab Calloway, band leader; Ray Charles, singer/musician; and Elias Lomax Hawes, folklorist from Arlington, Virginia were among 13 American Artists who were honored by President Clinton on October 7, 1993 with the prestigious National Medal of Arts. Other awardees included Walter Amosberg, Stanley Kunitz, Robert Merrill, Robert

LEADS

MAKERS



CHATTER

"I'm always fascinated in life by what people are underneath."

— **Jeremy Irons**, actor, whose latest film is *M. Butterfly*

BIRTHDAYS

- Bill Dana, comedian: 69
- Steve Miller, singer: 50
- Karen Allen, actress: 42
- Bob Geldof, singer: 39

No room at the inn: Madonna needs her space — and her privacy — so when Jerusalem's King David Hotel couldn't give her and her entourage a whole floor, she went to Tel Aviv. Although her concert today is in Tel Aviv, the singer wanted to stay in Jerusalem and visit holy sites there and in neighboring Bethlehem. Monday, Madonna visited the Church of the Nativity in Bethlehem, believed to be the site of Jesus' birth. Police blocked her attempt to visit Jerusalem's old walled city, because they feared ultrareligious Jews would riot if the singer tried to tour the ancient Western Wall during the Sukkot holiday. Madonna's provocative manner is not in line with Orthodox views.

Honored guests: Bandleader Cab Calloway, singer Ray Charles and film director Billy Wilder are among 13 Americans President Clinton will honor with the 1993 National Medal of Arts, the White House announced Monday. Other recipients of the award include arts patrons Walter and Leonore Annenberg, poet Stanley Kunitz, folklorist Bess Lomax Hawes, writer William Styron, playwright Arthur Miller, baritone Robert Merrill, artist Robert Rauschenberg, dancer-choreographer Paul Taylor and theatrical director Lloyd Richards. They'll all be guests of honor Thursday at the White House.

Short take:

■ Tammy Faye Bakker married Kansas developer Roe Messner over the weekend in Rancho Mirage, Calif.



Magazine's cover, shot by Annie Liebovitz, is a parody of Rodin's "The Thinker."

The Detroit News

Tuesday

OCTOBER 5, 1993

CITY HALL FESTIVAL

TRIBUTE TO CAB CALLOWAY

Thanks to the support of Mayor Edward I. Koch, the City Hall Festival has resumed the summer program of lunch hour concerts for the enjoyment of those who work in or visit downtown Manhattan.

Today's concert is a tribute to Cab Calloway. In his remarks, Mayor Koch said: "To put it very simply: there is no brighter star in American music—past, present or future—than Cab Calloway."

The City Hall Festival was organized in 1967 by Oscar Kanny, who raises the funds and produces the concerts, at no cost to the city.

The 1985 series of summer concerts is supported by the following community minded sponsors:

AT&T



Con Edison

The Dun & Bradstreet Corporation

Home Life Insurance Company

Irving Trust Company

F. W. Woolworth Co.

Previous City Hall Festivals have honored George Gershwin, Richard Rodgers, Pearl Bailey, Ed Sullivan, Alan King, Tito Puente, Duke Ellington, Tony Bennett, Carol Channing, Yul Brynner, Lionel Hampton, "The Fantasticks," Chita Rivera, Beverly Sills, Bobby Short, Puerto Rican Dance Theatre, Gerald Schoenfeld and Bernard Jacobs (The Shuberts), Machito, Dance Theatre of Harlem, Robert Merrill, Vernel Bagneris and the cast of "One Mo' Time!," Miriam Colon Edgar, the Puerto Rican Traveling Theatre, Friars Club, Celia Cruz, Joey Adams, the Alvin Ailey American Dance Theater, WNEW-AM, Rita Moreno, Roberta Flack, Betty Comden and Adolph Green, and Bobby Capo.

Special thanks to the following cooperating city agencies: The Mayor's Office of Special Projects and Events, The Mayor's Voluntary Action Center, The Mayor's Office of Minority and Ethnic Affairs, The Municipal Broadcasting System, The Department of Parks & Recreation, The Police Department, The Department of Sanitation, and The Department of General Services. Our thanks, as well, to the Theatre Authority.



THURSDAY, SEPTEMBER 5th, 1985

12:30 - 1:30

(Raindate: Monday, September 9th, 1985

CITY HALL PLAZA

EDWARD I. KOCH, Mayor

City of New York

PROGRAM

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

A Word About..... CAB CALLOWAY

Cabell Calloway was born in Rochester, New York on Christmas night in 1907. Educated in Baltimore where the family moved when he was a toddler, Cab Calloway also attended Cranne Law School in Chicago at the urging of his father, to make financial ends meet, however, Cab took a part-time job as an emcee in a south side nightclub. Soon he was writing, singing and producing in place of a legal career, a theatrical career was born.

After a stint leading a Chicago band known as the Alabamians, Cab Calloway moved to New York City where he accepted a starring role in his first Broadway show, "Connie's Hot Chocolates." His high-stepping show-stopping performance earned him a headline spot at Harlem's famed Cotton Club and the rest, as they say, is history.

The "King of HI-DE-HO," as Cab Calloway is affectionately known, has appeared in more than 250 television shows, as well as in a host of films, including "Stormy Weather," "St. Louis Blues" and "The Cincinnati Kid." He is a favorite of supper club audiences in the United States and Europe and is currently touring coast-to-coast with his daughter, Chris Calloway, in "Cab Calloway Cotton Club Revisited."

In addition to his many theatrical activities, Cab Calloway contributes his time and interest to a variety of charitable organizations including The American Red Cross, the Jewish Home for the Aged, the Vision Fund, and Lights On.

Cab Calloway is celebrating his 60th year in show business.

PRESENTATION
CITY OF NEW YORK CERTIFICATE OF APPRECIATION

To
CAB CALLOWAY

By
EDWARD I. KOCH
Mayor

MISTRESS OF CEREMONIES
CHRIS CALLOWAY
Co-Star of
"CAB CALLOWAY
COTTON CLUB REVISITED"

MUSICAL TRIBUTE
BY
FRIENDS
OF
CAB CALLOWAY

The City Hall Festival
is produced by
OSCAR KANNY

CITY HALL FESTIVAL

EDWARD I. KOCH, Mayor, City of New York

PRESENTS

A Tribute to

CAB CALLOWAY

September 5th, 1985

THURSDAY — 12:30 - 1:30 P.M.

(Raindate, September 9th, 1985)

CITY HALL PLAZA

Presentation

City's Certificate of Appreciation
to

CAB
CALLOWAY

by

MAYOR EDWARD I. KOCH

MISTRESS OF CEREMONIES

CHRIS CALLOWAY

Co-star of

"CAB CALLOWAY
COTTON CLUB REVISITED"

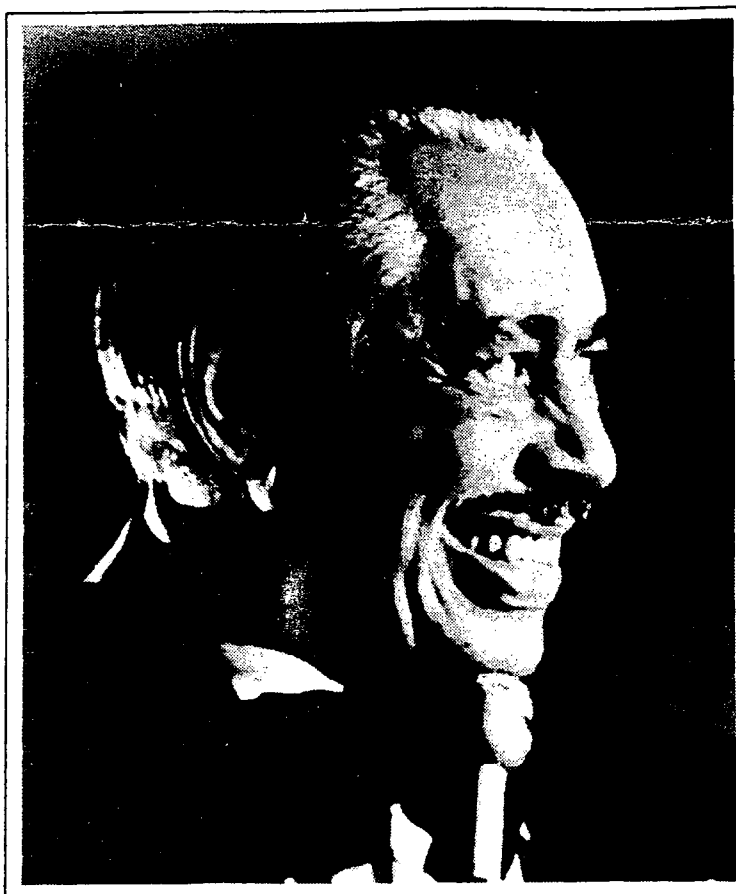
Program

A MUSICAL TRIBUTE

performed by

FRIENDS OF
CAB CALLOWAY

THE CITY HALL FESTIVAL
IS PRODUCED BY
OSCAR KANNY



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REMARKS BY MAYOR EDWARD I. KOCH
PRESENTING CERTIFICATE OF APPRECIATION TO CAB CALLOWAY
THE CITY HALL FESTIVAL
CITY HALL PLAZA - MANHATTAN
THURSDAY, SEPTEMBER 5, 1985 AT 12:30 P.M.

HI-DEE-HI-DEE-HI!

HO-DEE-HO-DEE-HO!

DON'T WORRY, I'M NOT GOING TO KEEP IT UP. BECAUSE NOBODY
CAN KEEP UP WITH, MUCH LESS HOPE TO SURPASS, THE LEGENDARY CAB CALLOWAY.

TO PUT IT VERY SIMPLY: THERE IS NO BRIGHTER STAR IN
AMERICAN MUSIC -- PAST, PRESENT OR FUTURE -- THAN CAB CALLOWAY.
IN A FEW MINUTES, IT WILL BE MY GREAT HONOR TO ASK THE ONE AND ONLY
CAB TO ACCEPT THE OFFICIAL TOKEN OF NEW YORK'S RESPECT, LOVE AND
ADMIRATION: OUR CITY'S CERTIFICATE OF APPRECIATION ON THE OCCASION
OF HIS 60TH ANNIVERSARY IN SHOW BUSINESS.

CAB, I WELCOME YOU TO CITY HALL ON BEHALF OF SEVEN AND
A HALF MILLION NEW YORKERS.

BEFORE I ASK CAB TO PAY US THE COMPLIMENT OF ACCEPTING
THIS CERTIFICATE -- WHICH IS PROOF OF OUR CITY'S PERMANENT MEMBER-
SHIP IN THE CALLOWAY FAN CLUB -- I WOULD LIKE TO WELCOME MRS.
CAB CALLOWAY -- THE GRACIOUS "NUFFIE" AND THEIR GIFTED DAUGHTER,
CHRIS CALLOWAY.

(MORE)

CHRIS IS GOING TO "EMCEE" THIS MUSICAL TRIBUTE TO HER FAMOUS FATHER BY "THE FRIENDS OF CAB CALLOWAY".

NOW OBVIOUSLY, IF ALL THE "FRIENDS OF CAB CALLOWAY" WERE TO TRY TO GATHER AT CITY HALL, THE RESULT WOULD BE COAST-TO-COAST GRIDLOCK.

SO A FEW OF HIS CLOSEST FRIENDS ARE GOING TO LEND THEIR TALENT IN PRAISE OF CAB, AND THEY'LL BE INTRODUCED BY CHRIS.

BY THE WAY, CHRIS IS AN OUTSTANDING PERFORMER IN HER OWN RIGHT. SHE HAS STARRED ON BROADWAY, IN PRIME TIME AND SOAP-OPERA TELEVISION. I MENTIONED THAT CAB IS CELEBRATING HIS 60TH YEAR IN SHOW BUSINESS. AMONG THE THINGS HE'LL BE DOING TO CELEBRATE IS TOURING WITH CHRIS IN A WONDERFUL PRODUCTION TITLED: "CAB CALLOWAY-THE COTTON CLUB REVISITED."

THE FABLED COTTON CLUB IN HARLEM, WAS WHERE CAB SPENT THE 10 YEARS THAT LAUNCHED HIM TO STARDOM. WHEN THE "COTTON CLUB" MOVIE CAME OUT, A TALENTED ACTOR NAMED LARRY MARSHALL PLAYED THE PART OF "CAB". CAB LET IT BE KNOWN THAT HE LIKED THE PERFORMANCE, BUT NUFFIE CALLOWAY -- WHO HAS BEEN "MRS. CAB" FOR JUST ABOUT 43 YEARS, SAID:

"MY LIPS ARE SEALED."

(MORE)

THE TRUTH IS THAT, NOBODY...NO MATTER HOW TALENTED...CAN SUCCESSFULLY IMITATE CAB...THAT'S BECAUSE CAB IS QUINTESSENTIALLY INIMITABLE. HE INTRODUCED "MINNIE THE MOOCHER" AT THE COTTON CLUB...AND NOBODY BUT CAB CAN EVER SING THAT SONG RIGHT. BUT I'M STILL TRYING: "SHE WAS A LOW-DOWN HOOCHY-KOOCHER"...

PROBABLY, CAB'S MOST MEMORABLE ROLE WAS THAT OF "SPORTIN' LIFE" IN GEORGE GERSHWIN'S "PORGY AND BESS". GERSHWIN CREATED THE ROLE SPECIFICALLY FOR CAB, BUT OTHER COMMITMENTS KEPT HIM OUT OF THE OPENING PRODUCTION. HOWEVER, IN 1952, THE CLASSIC WAS REVIVED, AND THE CAST TOURED THE UNITED STATES, EUROPE AND RUSSIA... STARRING CAB...AS "SPORTIN' LIFE", WHOSE FAMOUS MUSICAL PHILOSOPHY IS: "IT AIN'T NECESSARILY SO."

CAB, TODAY'S PROGRAM HAS ITS ELEMENTS OF SURPRISE. BUT I'M GOING TO REVEAL A LITTLE, SAYING THAT YOUR GOOD FRIEND LILLIAN HAYMAN (WHO PLAYS "SADIE GRAY" ON THE SOAP OPERA "ONE LIFE TO LIVE" AND WHO WON A TONY FOR BEST-SUPPORTING ACTRESS IN "HALLELUJAH, BABY!") HAS SPENT MANY WEEKS ROUNDING UP MEMBERS OF THAT FAMOUS "PORGY AND BESS" COMPANY.

(MORE)

SUFFICE TO SAY, THEY'VE COME FROM ALL OVER THE COUNTRY TO BE WITH YOU TODAY, AS HAVE YOUR LONGTIME MUSICAL ASSOCIATE DANNY HOLGATE AND OTHER GIFTED MUSICIANS AND PERFORMERS.

BY THE WAY, IT'S A CALLOWAY FAMILY TRADITION TO HELP CHARITABLE AND EDUCATIONAL ORGANIZATIONS. CAB DEVOTES HIS TIME AND SUPPORT TO THE AMERICAN RED CROSS, THE JEWISH HOME FOR THE AGED, THE VISION FUND, AND "LIGHTS ON":

BEFORE I PRESENT THE CERTIFICATE OF CAB-APPRECIATION I'D LIKE TO NOTE THAT THIS PROGRAM MARKS THE LAST OF THIS SEASON'S CITY HALL FESTIVALS, WHICH ARE SPONSORED BY COMMUNITY-MINDED CORPORATIONS, AND ARE PRODUCED BY OSCAR KANNY.

- CAB, YOU ARE NOT JUST A STAR OF AMERICA'S MUSIC...YOU ARE AMERICA'S MUSIC.

(PRESENTS CERTIFICATE. CALLOWAY RESPONDS. CHRIS EMCEES).

#



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

HUGH L. CAREY
GOVERNOR

September 27, 1977

Dear Mr. Calloway:

On October 8 we will celebrate the 200th anniversary of our great State, New York, with a gala festival on the Empire State Plaza in Albany. The "I Love New York Fall Festival" will feature all that is best in our State, our products, our people, our past and our present.

Specifically, this gala day will be highlighted with continuous entertainment from the opening of the Festival until dusk, culminating with a superstar show at 6:30 p.m. We will showcase New York's prime food products, wine, beer, cheese, apples, and a wide variety of other delicious foods. Another major attraction will be a spectacular art exhibition, featuring masters of the New York School, the Hudson River School and folk art of the State.

Certainly, our most impressive resource is our people; and since being a New Yorker is very much a state of mind, for the purpose of this celebration anyone born, educated, employed or residing in our State is considered one of us. Since you obviously qualify as one of our most distinguished citizens, I invite you to share in these festivities as my personal guest. It will be my pleasure to introduce our glittering alumni to the expected 100,000 people we anticipate will attend the Festival.

If you are unable to join us in person, a taped message or written note for your fellow New Yorkers will bring your thoughts to them on that important day. But I very much hope that you can be there in person. A complete program for the day will be sent out shortly; but, in the meantime, I hope you can arrange to be with us. Please write or call Esther M. Swanker, 518-474-8826, and say you'll be with us.

Sincerely,

A handwritten signature in cursive script that reads "Hugh L. Carey".

Mr. Cabell Calloway
1040 Knollwood Road
White Plains, New York 10603



STANLEY FINK
SPEAKER

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

January 27, 1985

Dear Mr. Calloway:

Please permit me to extend to you my heartiest congratulations as you are honored today by the people of the Town of Greenburgh.

As one who played a leading role in a very exciting period in American musical history, and whose music brought joy to millions throughout the United States, Europe, South America and the Caribbean for more than six decades, you have made enduring contributions to our State's rich artistic and cultural heritage.

It therefore gives me great pleasure to join with Supervisor Anthony Veteran, the members of the Greenburgh Town Board, and the host of Greenburgh residents who are recognizing "Cab Calloway Day" with a well-deserved tribute to your musical career and accomplishments.

Best wishes for an enjoyable and meaningful celebration!

Very truly yours,

A handwritten signature in cursive script that reads "Stanley Fink".

Stanley Fink
Speaker

Jazz great Calloway named to hall of fame

Bandleader spent last days in Del.

By GARY MULLINAX
Staff reporter

Jazz singer Cab Calloway, who lived in Hockessin for five months before his death in 1994 at age 85, was inducted into the International Jazz Hall of Fame Friday night in Tampa, Fla.

His widow, Nuffie, was in Tampa for the ceremony. She lives in Cokesbury Village, Hockessin, where her husband also lived. Their daughter, Cabella, is also a Delaware resident.



Cab Calloway

"My husband was incredible," Nuffie Calloway said by telephone on Friday. "He worked until six months before he had his stroke. His voice was just as strong as ever because he was a trained singer. Nobody knows that."

She said Calloway deserves the honor not only because of his own performances but also for his influence on other musicians in his band. "He had a knack for picking good ones — Cozy Cole, Chu Berry, Milt Hinton, Jonah Jones. I just saw Illinois Jacquet in the hotel last night. He was the baby of our band. He joined when he was about 20."

Calloway's daughter, Chris Calloway, sang two of her father's best-known songs at a dinner Thursday night: "Stormy Monday" and "Minnie the Moocher."

This is the Hall of Fame's third induction ceremony. Other inductees on Friday included Lionel Hampton, Dave Brubeck, Rosemary Clooney, Lou Donaldson, Cannonball Adderly, Charles Mingus, Billie Holiday, Hinton and Jacquet.



The News Journal/BRIAN BRANCH-PRICE

FAMILY: Among those attending the pond dedication ceremony at Sanford were (from left) Cabella, Caleb and Andrew Langsam, Michael Dungey, Lael Calloway, Zulme "Nuffie" Calloway, and Josh Langsam.

Sanford dedicates pond to Cab Calloway

By **PATRICIA TALORICO**
Staff reporter

About 700 people attended Friday's dedication of a pond at Sanford School in Hockessin that was named for Cab Calloway.

Calloway did not attend the ceremony. The 86-year-old entertainer and bandleader suffered a stroke in mid-June and is recuperating at his White Plains, N.Y., home.

Last fall, Sanford's class of 1994 decided to bring back a part of the school's history by re-establishing the pond, which had dried up in the early 1980s. The class raised about \$27,000 for the effort. All work — environmental studies, physical design and clearing of thickets — was completed by people associated with Sanford. In April, the school auctioned off the right to name the pond. MBNA America Bank — which bid

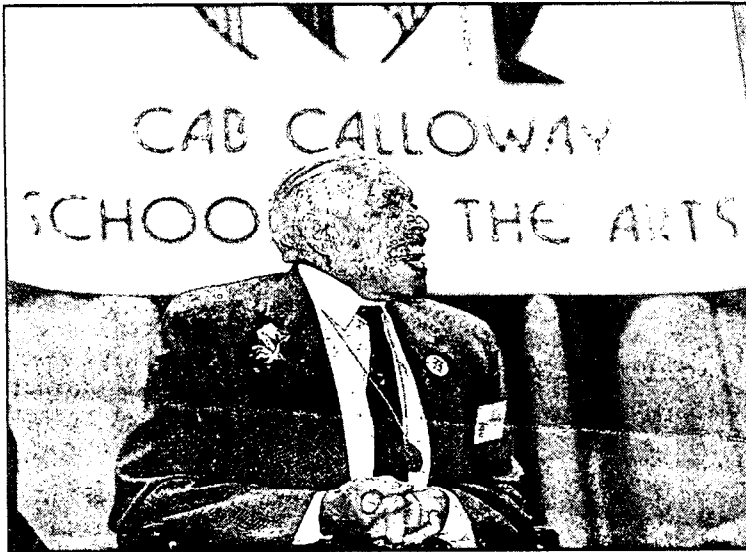
\$5,000 — chose to name the pond after Calloway.

Kerins said the pond was named for Calloway's because of his connections to the school. The "King of Hi-De-Ho," known for his signature song "Minnie the Moocher," has been a frequent visitor to northern Delaware since his daughter, Cabella Langsam moved to Hockessin 12 years ago. Langsam, an MBNA employee, is on the school's board of trustees and is a Sanford parent. One of Calloway's grandsons, Caleb Langsam, graduated last year and another, Josh Langsam, is a Sanford eighth-grader.

Calloway's wife of 40 years, Zulme, known as "Nuffie," two daughters, a nephew and two grandsons attended the ceremony.

Kerins said the dedication ceremony was videotaped and will be sent to Calloway.

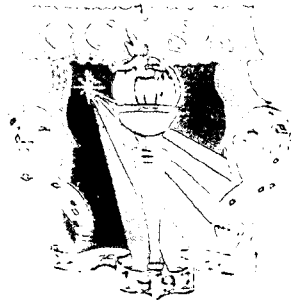
EXHIBIT 4

A REAL HOOTCHIE-COOTCHER

Special to Crossroads/**ROBERT CRAIG**

MUSIC MAN: Cab Calloway sings his signature song, "Minnie the Mooch," along with a chorus Oct. 4 at the dedication ceremony of the year-old Cab Calloway School of the Arts in the basement at Wilmington High School. Calloway, whose daughter Cabella lives in Hockessin, received a National Endowment for Arts medal last week at the White House in Washington, D.C.

Cab Calloway School of the Arts



Proclamation: The Calloway Family as a Founder of the School!

The Cab Calloway School of the Arts is celebrating its Tenth
Anniversary on November 24, 2002, and

is grateful to the many individuals and organizations
that have supported the school in its years of growth.

For more information, please contact:

Mr. Cab Calloway School of the Arts

1000 14th Street, N.W.

Washington, D.C. 20004

Phone: (202) 462-1234
Fax: (202) 462-1234
Email: info@cabcalloway.org

www.cabcalloway.org

Thank you for your support!

Mr. Cab Calloway School of the Arts

Cab Calloway School of the Arts

Examine, Explore, Excel

Our History

In 1992, a group of parents approached the Red Clay Consolidated School District with a proposal to establish a Creative and Performing Arts Middle School. The idea stemmed from the desire to ensure a quality education for students while nurturing their individual talents and artistic abilities. Studies showed that schools specializing in the arts had a more positive influence on children than those that solely provided academic curriculums. The Red Clay Consolidated District found space on the Wilmington High School campus, and the first public arts school in Delaware was created, providing education for 125 students in grades six and seven.

Around this time, American jazz icon, Cab Calloway, and his wife moved to Delaware to be close to their daughter, Cabella Calloway Langsam. Calloway gave his time, talent and love to the new arts school and in November 1992, cut the ribbon at its official grand opening. A year later, the school was renamed the "Cab Calloway School of the Arts" (CCSA) in his honor. In 1994, our students were chosen to sing before thousands of people in the Cathedral of St. John the Divine in Harlem at a memorial service held in his honor. Our students entertained Hillary Rodham Clinton, performed with Bob McGrath from the original cast of Sesame Street, represented the State of Delaware with their dancing and singing at The Kennedy Center in Washington, D.C., and worked with various world renowned musical artists.

In 1993, an eighth grade curriculum was added and enrollment reached 200. The school expanded again in 1996 to include grades nine and 10. Grades 11 and 12 followed, and in June of 2000, the first senior class graduated.



Our Purpose

Cab Calloway School of the Arts features a rigorous, college-prep level academic curriculum infused with training in the arts. CCSA is a public choice magnet school. Prospective students must apply and assess in two arts areas to be eligible for acceptance. Enrollment has currently reached 760 students, and will increase to 800 for the 2003-2004 school year. Our small school population and even smaller class sizes are a huge educational benefit for all students. Seventy-six percent of our students are Caucasian, twenty percent are African American, three percent are Hispanic and one percent are Asian. Our students come from every school district in New Castle County and areas further south.

Our students must make a commitment to achievement in the arts and must maintain high academic and behavior standards. CCSA upholds its own commitment to providing these talented and dedicated children with a positive learning environment.

The mission of the middle school is to provide a quality education, both academically and artistically, to students who have a desire to explore the creative and performing arts.

The high school seeks to provide young people from diverse backgrounds with intensive training in the arts in the context of an exemplary, comprehensive, academic curriculum that will prepare them for success in higher education and employment. We are proud to announce that ninety percent of our graduates move on to post-secondary education.

Our Ties to Wilmington High School

Wilmington High School was created in 1872. In 1899, the building on Pennsylvania Avenue opened, residing on the land across the Wilmington and Brandywine cemetery, and east of Trinity Church. This space is now home to The Chase Building.

By the 1950's, the building was becoming inadequate. Chick Laird, a local philanthropist, donated land for a new building at the city's edge on Lancaster Avenue at Dupont Road. The new Wilmington High School was constructed on this land in 1960. The original cornerstone and some wrought iron work from the old building were installed on the grounds, and the marble plaque honoring Alumni who died in World War I found a home in the theatre lobby of the new building.

In the early 1970's, the city (and nation) went through a period of racial violence. The federal desegregation order was put in place which created city-suburban busing, dissolved the Wilmington school district, and created 4 vaguely pie shaped districts in New Castle County.

It also mandated that one high school remain in the city - Wilmington High. Suburban students resisted being bused to the school because of Wilmington High's supposedly poor academic standing and the "inner city" dangers found in other cities such as Detroit and Watts. The school gained a reputation for tough, poor kids and mediocre academics. The school seemed trapped in a downward enrollment spiral.¹

The Red Clay Consolidated School District implemented alternatives in an effort to turn the school around. They renamed it The Center for Educational Innovation, and in addition to the traditional high school curriculum offered space to an assortment of specialty schools including a science academy, banking academy, the Phoenix School and the Middle School for the Creative and Performing Arts (later renamed Cab Calloway School of the Arts). The most promising of these programs turned out to be the science academy, which morphed into Delaware's first charter school, The Charter School of Wilmington. It officially opened in September 1996.

Cab Calloway was also very successful, and the Red Clay Board granted its founders permission to expand its programs to encompass high school grades. The high school program opened in September 1997 with grades nine and 10. Grades 11 and 12 were added as classes matured, and in June 2000, CCSA graduated its first senior class.

The traditional Wilmington High School Program failed to draw enough students to remain viable. Despite protests from its alumni who rightly mourned the passing of a distinguished Wilmington institution, the last class graduated in 1998.

Wilmington High's reincarnation as two vibrant schools -- one Arts, one Sciences -- will preserve the WHS tradition of excellence, and history of achievement. A Wall of Fame has been erected in the main lobby of the building to showcase Wilmington High graduates who have achieved distinction in their communities. The Wilmington High School logo has also remained on the exterior of the building, securing its place in Wilmington's history.

The sterling academic achievements accomplished by the new schools follow directly in the spirit of their predecessor. As the news Journal said in 1996, "Wilmington High's future will be on [the] cutting edge of 21st century education.... Now it is home to vibrant new educational programs and its promise is boundless."²

1. Editorial, "Wilmington High's future will be on cutting edge of 21st century education" The News Journal, Wilmington, DE. Monday, Oct. 28, 1996.

2. Ibid.



HARPO, INC.

110 N. Carpenter Street
Chicago, Illinois 60607
312.633.1000 Fax 312.633.1111

HARPO.

September 2, 1993

Ms. Cabella Calloway Langsam
MBNA America
400 Christiana Road
Newark, DE 19713

Dear Ms. Langsam,

Thank you for inviting me to the dedication ceremony of the Cab Calloway School of the Arts. I'm so sorry to say that I can't join you due to my own commitments. But know that the fact that you thought enough to invite me to participate in this historical day, means a great deal.

With much appreciation,

A large, stylized handwritten signature of Oprah Winfrey in black ink. The signature is fluid and cursive, with a large loop at the top and a long, sweeping tail.

OW/ms

EXHIBIT 5

Thursday, Sept. 7, 1995

COMMUNITY Q&A

Becoming Cab Calloway dean has been music to her ears



KENT COUNTY NATIVE: M. Denise Tolliver is the new dean of the Cab Calloway School of the Arts.

By PATRICIA V. RIVERA
Staff reporter

M. Denise Tolliver recently joined the Cab Calloway School of the Arts as dean. She said it wasn't easy leaving her native Kent County after 20 years with the Caesar Rodney School District, the district in which she also grew up. But the chance to work with the state's only public performing arts middle school lured the music lover north of the Chesapeake & Delaware Canal.

Q. What attracted you to the Cab Calloway School?

A. I chose Cab Calloway because it offered two things that I love most as a person and as a professional. The school has a very strong academic program with dedicated staff

PROFILE

NAME: M. Denise Tolliver

AGE: 41

OCCUPATION: Dean of the Cab Calloway School of the Arts

FAMILY: Husband, Elsworth, children, Pamela, 25, and Kayshya, 23

RESIDENCE: Rockford Town Condominiums

SNAPSHOT: After 20 years with the Caesar Rodney School District, Tolliver has joined the Red Clay Consolidated School District as dean of the Cab Calloway School of the Arts.

and it offers an interest in the arts.

You see, my husband and I have for many years been involved in the entertainment business. We've owned a recording studio in Camden called Ready Set Record since 1981.

We've run the whole gamut of services from managing a band to performing. We're also songwriters, producers, publishers. The music we focus on is R&B, rap and gospel. Those are the two areas I feel I would bring something to the program as an educator with many years' experience and as a person involved with music.

Q. Will you be applying your music skills in your new job?

A. If anything, I think I'll be using the management skills I learned from running the business. You have to know about balancing your time, budget, working with people — letting them hold on to their creativity.

Q. What are some of your

See Q&A — 21

CROSSROADS

Q&A: Goals set for staff, students, parents

FROM PAGE 1

goals for this year?

A. I have three goals. One is for my staff, and that's to remember that we are all here to provide quality education.

I'd like the students to establish a climate of school spirit and pride. That's important because we are part of a building that houses three academies and a traditional high school. I want students at Cab Calloway to feel like they are at their school and not just sharing a roof with other academies.

And for parents, I want to develop open communication, ensuring that we are communicating with them and giving them the opportunity to get involved and take ownership.

Q. How many students are enrolled, and how are they selected?

A. We have about 320 students. The selection starts with a formal application, and then there's an audition — it's not so much to gauge talent, but to help the students choose their interest in arts. We usually have a waiting list; now there's about 50 students on it.

There aren't any academic requirements [like grade point averages]. We do require that students do their best once they're here, and we'll strive to help them do the best they can academically. Of course, they should also maintain satisfactory progress in the arts.

Q. What type of arts curriculum does the school offer?

A. We have six major arts areas: drama, dance, visual arts,

instrumental music, vocal music and communication arts. Students have to select a major and a minor from these areas. The school also holds productions, gallery exhibits, concerts and performances throughout the community.

Q. How do you balance the academic and artistic needs of the students?

A. The program is 27 percent art, but it's integrated into the other subjects. On three days, [Monday, Wednesday and Friday], we block in their schedules two 45-minutes back-to-back for their majors. And on Tuesday and Thursday, they have time for minors.

Q. What do you expect will be your biggest challenge in your new post?

A. I think it already happened. It was coming up from below the canal after 20 years at one district. New Castle County is a totally different culture in regards to education. Downstate you never hear about deseg.

The rest is like riding a bike or skating. I don't want to say it's easy, but it's also not difficult once you're able to teach students and deal with every situation.

Q. Do you think there's the misconception that performing arts school are like "Fame," with kids dancing and singing down the halls?

A. We had an open house Aug. 23, and one of the comments from a teacher was just that — others think kids at this school are dancing on tables, and it's not like that. First and foremost, we're a

school, so we must prepare them academically. The arts just makes the education more enjoyable. It's inspiring for the students — a break they really enjoy.

There's no dancing on tables here — unless it's in rehearsals for a play. We have a traditional schedule with rules, procedures and policies.

Cab Calloway eighth grader the state's top speller

Eighth-grader Caroline Woods will represent the State of Delaware at the National Spelling Bee in Washington, D.C., in May — again. Caroline, who won first place in the State Spelling Bee last year, repeated the feat recently for two consecutive wins. A student at the Cab Calloway School of the Arts, a Red Clay Consolidated School District theme school in Wilmington, Caroline has been at the top of her academic form for years.

When she was in the fifth grade, Caroline took part in a Johns Hopkins pre-SAT testing program, placing 12th among girls in math and 69th in verbal, nationwide. Just two years later, when she was in seventh grade, she participated in the Johns Hopkins SAT program, in which seventh-grade students take the actual SAT test. In that contest, she was honored by the State of Delaware for her high scores.

At Cab Calloway, Caroline is an accomplished dance major, president of the National Junior Honor Society, vice president of student government and will play the part of Daisy Mae at Cab Calloway's spring production of "Li'l Abner" in mid-May.

"When it comes right down to it, Caroline epitomizes the true meaning of the word 'scholar,'" a spokesman said. "She is able to assimilate creativity within a rigorous academic schedule and represents the progress that can be made at schools like



Caroline Woods will travel to Washington, D.C. in May to represent Delaware in the National Spelling Bee.

Cab Calloway."

The apple doesn't fall far from the tree, it seems, since Caroline's father, Jim Woods of Ramsey Ridge, led his team to win the National Spelling Bee for Parents in the United States last year.

Cab Calloway, where students get into the act

By JILL HENEBRY

A few years ago, parents in the Red Clay Consolidated School District decided they wanted their children to be excited about school, they wanted their kids to wake up in the morning and actually want to go to school.

Those same parents began visiting different schools across the East Coast to see what made different children excited about school. Marty Lassman, vocal music teacher and representative on the Cab Calloway Board Of Directors said.

What the parents found was that schools that specialized in a particular area seemed to get more response from the students. They also found that schools specializing in the arts seemed to have a more positive influence on the children, Mr. Lassman said.

After completing their research, the parents went to the school board to suggest the possibility of establishing a creative and performing arts school.

According to Mr. Lassman and Linda Emeriek, an English teacher with the school, the board was so enthusiastic about the idea,

that in just a few months the doors to the school opened.

Although this was good for the students, the school lacked many things such as a secretary and various school supplies. The dean of the school was hired in August, and by the time the school opened its doors, there were still no school rules and class schedules ended up being changed after the first week of classes, Mr. Lassman said.

The school opened in 1992 under the name Creative and Performing Arts Middle School and is housed in Wilmington High School.

Recently named after famous performing artist Cab Calloway, the school is home to almost 300 students in the sixth through eighth grade. One of the goals of the school is to keep the class sizes small, in order to create more of a family atmosphere, and to enable the teachers to get to know their students on a more personal level, Mr. Lassman said.

Students of this school attend the same academic classes as other middle school students. "They spend just as much time in classes for social studies, science,

English, math, and reading as do their peers in other middle schools," Mr. Lassman said.

What makes this school different is that students may pick one of six majors and minors in an art. Students may choose to major or minor in visual art, communication art, vocal music, instrumental music, dance, and drama, Mr. Lassman said.

By allowing the student to

choose which course of study to pursue, they develop an enthusiasm that carries over into their academic courses, Mr. Lassman said.

The students find that as they succeed in their arts classes, they are also succeeding in their academic classes.

The school is also teaching children discipline without them knowing it, Ms. Emeriek said. "Regardless of the arts discipline a student has an interest in and chooses, it is a discipline, and in order to come up with a fine piece of visual art, a story that is publishable or a highly polished performance, it requires a tremendous amount of effort. The rewards that the children receive from this are enormous," she said.

This is a school where students can choose to go, they can choose their major, and it is not overwhelming for them, Ms. Emeriek

said. Unfortunately for those students, there are currently no other schools like this in the area, so students must go from studying in a school geared to promoting the arts, to a normal high school, with no specialization.

Since this is part of the public school system, there is no cost to students who wish to attend, Mr. Lassman said. Students who do want to attend, must go through an audition, but this is no an elimination process. It is just a means of measuring a student's ability before they start classes, Mr. Lassman said. He stressed that no student has ever been turned away just because they could not already play a musical instrument.

This year the school has put on "Babes in Toyland", which for the first time ever, used adult actors as well as students. The master Toymaker, was played by the Honorable Judge Vincent J. Poppito who is also president of the Cab Calloway Board of Directors.

The select chorus and advanced company go out on an average once a month to perform for places like M B N A, Christiana Mall, Concord Mall, Child Care Connection, and

the DuPont Company.

Mr. Lassman described Cab Calloway as a happy place, with a lot of excitement, and a lot of opportunity for kids to succeed.

"It's not like being in a large middle school, where you have a small group of kids that get to do something, here in every single class a student has the chance to be a star," Mr. Lassman said.

"Regardless of the arts discipline a student has an interest in and chooses, it is a discipline, and in order to come up with a fine piece of visual art, a story that is publishable or a highly polished performance, it requires a tremendous discipline and a tremendous amount of effort. The rewards that the children receive from this are enormous,"
Linda Emeriek, English teacher

said.

In the last few years, teachers have been using group work in their classrooms, because businesses have said that schools need to send them people who have the ability to work together. At Cab Calloway students find that they must work together to accomplish many of the projects that arise.

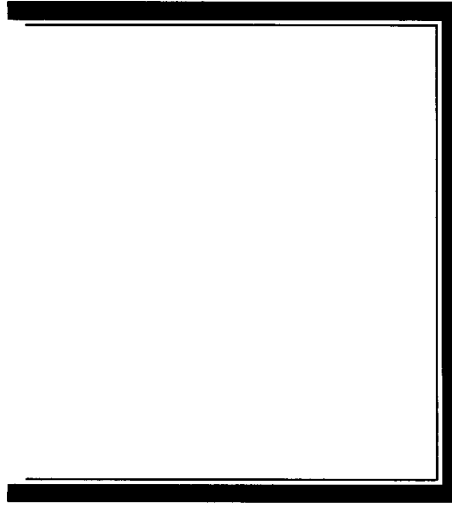
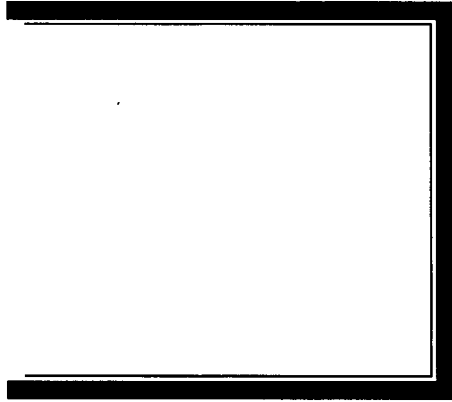
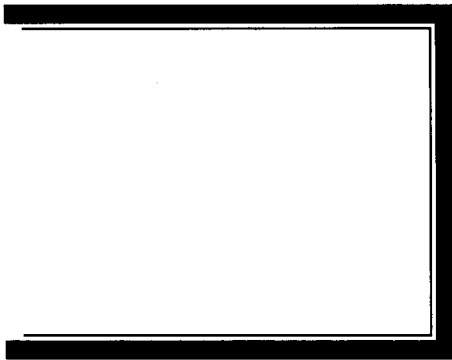
Once students complete the eighth grade they receive a certificate of completion, Ms. Emeriek

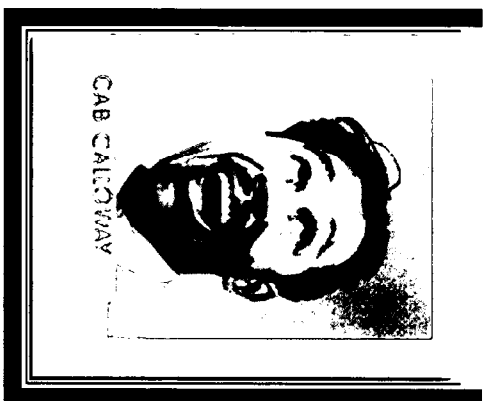
CAB CALLOWAY SCHOOL OF THE ARTS

Middle School
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Dance
Drama
Instrumental
Vocal
Visual Arts

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Click Here For In- service Page

High School
Communication Arts
Dance
Drama
Instrumental
Vocal
Visual Arts





ONLINE ARTS DIRECTORY

Administration



Dean Julie Rumschlag

[Contact Ms. Rumschlag](#)

Dean Rumschlag is returning for her seventh year at Cab Calloway. She has a B.A. in Special Education from St. Mary of the Woods College. She also has a M.A. in Education Administration from San Francisco University. Ms. Rumschlag has taught for two years in Indiana, five years in California and one year at Christiana High School. Our dean had also been the Assistant Principal at Christiana for three years. She is a yoga participant, and an avid music and theater enthusiast; Dean Julie Rumschlag is a very knowledgeable, multi-faceted and respected leader. Click on the dean's image to view her introduction movie.

"Remember to take time for things that are really important in life."

Mrs. Freeman is in her second year at Cab Calloway. She has a B.S. in Music Education from South Carolina State University, and a M.A. in Music Theory from Ohio State University. On top of that she is enrolled in the Ed.D. program for Innovation and Leadership at Wilmington College. Not only is she well certified, she has seventeen years of hands on experience. During that time Assistant Dean Freeman has been a band director, math, social studies and science teacher, choir director, dancer, and a color guard choreographer among other things. A veteran of the profession and a mother of eight, Mrs. Freeman will be a valuable asset to the staff at Cab Calloway. Click on the Mrs. Freeman's picture to view her introduction movie.



Asst. Dean Angela Freeman

[Contact Mrs. Freeman](#)

"The greatest competition is with one's self."

[Home](#)

EXHIBIT 6

GROWN-UPS IN TOYLAND

The Cab Calloway School's latest play has some surprises in the cast — adults.

By PATRICIA TALORICO
Staff reporter

It's been a bumpy rehearsal for director Kim Cantrell.

One of her lead actors is missing. Attending law classes in New York City, the actor has yet to make it to a full run-through. Another thespian, who admits to not yet knowing his lines, rushes out of the Wilmington High School auditorium looking for a phone. His beeper has gone off.

But Cantrell, who is directing Cab Calloway School of the Arts' production of "Babes in Toyland," seems to take it all in stride.

Sitting in the sixth row of the auditorium, she watches as the remaining actors rehearse a scene. Cantrell is silent until she spies something that makes her reach for her megaphone.

"OK, stop," her Alabama-

■ Calloway students sing at memorial service. Page 17

accented voice booms.

"Alicia. We love Alicia, because she made her entrance on time," Cantrell says to the cast about Calloway student Alicia Stark.

Then Cantrell, a Calloway and Wilmington High School drama teacher, turns her attention to another young actor, who is slowly shuffling across stage.

"The Piper children have been on stage for 10 minutes. Where have you been?" she asks, pointing to the boy, now frozen in place.

"I had to go to the bathroom," he mumbles sheepishly, his head down.

With more than 100 people — many of them children — involved in the production, such complications are bound to arise.

Calloway, the performing arts middle school at Wilmington High, has put on five productions since it was founded in 1992. But this holiday show is a little different. It's the first time professional actors will perform with the students.

The cast includes Family Court Chief Judge Vincent J. Poppiti, president of the school's board of directors. Poppiti, who has performed with the Candlelight Dinner Theatre and Salesianum Alumni Theater Association, is playing the Master Toymaker.

His cousin, Ciro Poppiti, has been traveling to rehearsals between classes at Columbia Law School in New York City. Ciro,

Thursday, Dec. 8, 1994



The News Journal/BRIAN BRANCH-PRICE

THE GYPSY: Actor Michael Richmond-Boudewyns (center, in red) joins Cab Calloway School students on stage.



BY THE BOOK: Judge Vincent J. Poppiti isn't quite done memorizing his lines as the Master Toymaker, but he does have a few court cases to attend to in his spare time.

a product of the Delaware Children's Theatre, has appeared on television and is best known for his featured part in the 1986 movie "Lucas" with Charlie Sheen and Winona Ryder. He was tapped to play the evil Uncle Barnaby by Calloway Dean Barbara Hedges, a friend from his community theater days.

The role of Alan is played by Michael Richmond-Boudewyns, who has a master's degree in fine arts from the University of Delaware. Community theater actress Denise Steif is Contrary Mary.

Producer Linda Emerick, a Calloway English and reading teacher, says the students were

excited to work with professional actors. "It's an extremely valuable experience for the kids. They get to see how they work, how they approach a role — it's really an artistic experience for them," she says.

But Vincent Poppiti, who has been acting since his college days, says he has learned just as much from the students.

"The kids are all very dedicated. It's like a full-time job for them; they've been here all day long," he says. "You can see the difference."

Poppiti has been trying to fit rehearsals around his work schedule and court hearings. He is still learning his lines.



DRESS REHEARSAL: Jesse Bell (Rodrigo), Kristin Maynard (the Widow Piper), and Phillip Lamplugh (Gonzorgo) run through a scene.

"You do it on lunch breaks and at night, driving in the car with your wife feeding you the lines. ... It will be interesting to see how quickly we can pull this together," he says, as the beeper attached to his belt goes off.

Emerick says "Babes in Toyland," costing about \$6,000, is Calloway's most ambitious undertaking. Costumes and props were borrowed from Opera Delaware and the Wilmington Drama League. Platforms in front of the stage came from John Dickinson High School. A special fiber optic curtain, which usually rents for about \$1,000 a day, is on loan from Wilmington



TO GRANDMA'S: Cab Calloway student Hyacinth Dunlap makes a convincing Little Red Riding Hood.

IF YOU GO

WHAT: Cab Calloway School of the Arts production of "Babes in Toyland"

WHEN: 2 p.m. Sunday

WHERE: Wilmington High School, Lancaster Avenue and Du Pont Road

COST: \$15, \$8 for students younger than 18. Group rates available. There is an additional fee to attend the post-performance reception at the Terrace at Greenhill. Tickets can be purchased at the door; at B&B Tickettown, 322 W. Ninth St., Wilmington; or by calling 658-5304.

lighting designer Aidas Gimbutas.

"The arts community in general is very generous ... and it helps to have your little networks," Emerick says.

Corporate sponsors have helped the school hire a 12-piece orchestra. Students and teachers are building sets with donated lumber. Volunteers include former Calloway students such as Hugh Stephen, now a Wilmington High freshman, who has returned to help with the musical.

Hugh, a stage crew supervisor, says he's donating his time " 'cause I just missed the middle school. I really liked it."

Performances today and Friday are for local school groups. Sunday's show is open to the public. Officials hope to sell out the 1,200-seat auditorium and use the money to purchase library and computer equipment.

Cantrell tries to return to the rehearsal again, but there's one problem; Vincent Poppiti is nowhere in sight. "The Master Toymaker left," says a student.

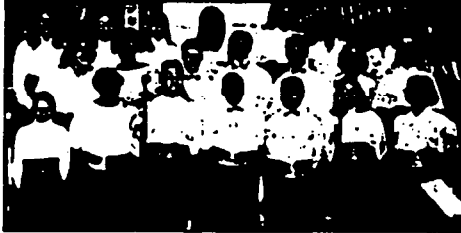
"Yeah, I saw him put his jacket on," adds another. "His beeper went off again."

Cab Calloway students present "Cinderella"



The Cab Calloway School of the Arts will present Rogers and Hammerstein's "Cinderella" at the theater at Wilmington High School on December 6, 7 and 8. Delaware's first choice middle school, Cab Calloway produces major musical productions, gallery exhibits, concerts and other programs for the community. Performances of "Cinderella" will be given at 9:30 a.m. on December 6 and 7 and at 7:30 p.m. December 7 and 8. Tickets for the morning performances are \$1. Evening performance tickets are \$6 for adults and \$3 for children. Wilmington High School is located at 100 N. du Pont Road at Lancaster Avenue. Tickets are on sale in advance from Cab Calloway students and the PTA or at the door before each performance. For more information, call the school at 651-2702. Pictured (left to right): Heather Turano, a stepsister; Jessica King, Cinderella; and Elena Pappas, the other stepsister, during rehearsals for the upcoming production.

Cab Calloway: Struttin' into the Future



Nobody stands still at the Cab Calloway School of the Arts. Even First Lady Hillary Rodham Clinton was impressed by the Calloway singers when she visited Wilmington High School last month. In fact, since 1992, administrators of the Calloway Middle School have believed that integrating intensive arts training with an interdisciplinary academic program not only provides excellence in education, it encourages, challenges and motivates students to become enlightened individuals. The rate of success for the school is dizzying, and since the Cab Calloway School has been given District approval to offer grades 6-10 as of September 1997, things are moving rather quickly.

Recruitment for High School and Middle School enrollment begins this November through January. Enrollment will be limited to 110 students per grade and students will be expected to meet arts assessment standards carefully designed by arts teachers and specialists. In addition, the academic program at Cab Calloway High School will strictly adhere to District and State guidelines. There will be two public CHOICE Open Houses at Wilmington High School, which houses Cab Calloway. Those meetings will be Thursday, November 14th from 7-9 p.m. and Sunday, November 17th, from 1-4 p.m. All who attend will have the chance to participate in panel discussions involving issues about the

Middle School as well as the High School. Participants will also be able to attend Calloway student performances and tour the school facility.

This November, Cab Calloway Middle School presents MY FAIR LADY, one of the two musicals presented each year. Calloway students have won state spelling and geography bees, are co-sponsors of an interscholastic Shakespeare Festival and enjoy extensive coverage by local press. This is the only school of its kind in Delaware, and within this unique, exciting environment, students realize that discipline is required to achieve great skill — not just in the arts, but in academic accomplishment as well. Overall, the Calloway program offers students of diverse backgrounds a progressive academic experience that aims to instill character and cultural awareness.

Behind every successful organization is a strong foundation. Governed by a dedicated Board of Directors and supported by the P.T.A. and school community, Calloway faculty and administrators are able to focus on what is most important: the students. Under the direction of Dean M. Denise Tolliver, academics are enhanced by an intensive arts curricula which includes visual arts, drama, dance, instrumental music, vocal music, and communication arts. In addition, Calloway students will enjoy professional artist-in-residence programs and the potential for internships with communications and arts organizations throughout the area.

So, anyone who wants to stand still should not consider Cab Calloway School of the Arts. But for those looking toward an enlightened future, this unique program will keep you moving. **FOR MORE INFO:** Contact Maria Hess, Arts and Development Specialist, Cab Calloway School of the Arts 651-2702.

by Maria Hess,

Wizardry becomes an art

At Cab Calloway, play fires up cast

By PATRICIA TALORICO
 Staff reporter

WILMINGTON — The winged monkeys are flying on skateboards and skates. Auntie Em's sporting shorts and battered black sneakers. Toto's really a long-haired dachshund named MacGregor.

Yo, Dorothy, you better believe you aren't in Kansas anymore.

The Cab Calloway School of the Art's production of "The Wiz" hits the stage tonight and Friday at 7:30 in the Wilmington High School auditorium. Tuesday, director Kim Cantrell was still working out a few kinks. Namely Aunt Em's shoes.

"Hon, I'm sorry, but Auntie Em wouldn't come close to wearing shoes like those," she said to a sneaker-clad Katie Brady who will play Dorothy's aunt.

The musical, which updates L. Frank Baum's classic "The Wonderful Wizard of Oz", includes a cast of more than 100 students — and one dog.

Sometimes, Cantrell said, the canine has performed better than some cast members.

"Generally, I never cast more than 70 and even that's chaos," she said. But Toto is another matter. "She's so precious," Cantrell said of the dachshund, owned by a Cab Calloway board member. "She's one of my most attentive, disciplined cast members."

Costumes for the Cab Calloway show include hula hoops and funky togs made of everything from Mylar to trash bags. Tunes are gospel, rock and soul.

"The Wiz" also includes some of the most challenging special effects the performing arts middle school has ever tried. Cantrell calls the music "technically, a really, really elaborate show."

In one scene, Cab Calloway eighth-grader Andrew Mitchell, who plays the Wizard, will throw



Heather Dierickx, 11, a munchkin, gets some help with her outfit from Elizabeth Goines, 11, before a dress rehearsal for this week's presentation of "The Wiz" by Cab Calloway School of the Arts.

IF YOU GO

What: "The Wiz"

When: Tonight and Friday at 7:30

Where: Wilmington High School, 100 N. DuPont Road

Cost: adults \$6; children \$3

"a fire ball" from his hand to shake up Martin Griffith's doubting Scarecrow.

"There's some danger involved," Cantrell said. "Andrew's got to sing the song, remember his choreography and do this trick. It's somewhat challenging for a 13-year-old."

Andrew admitted he was nervous about the trick that he learned from volunteer Raymond Harrington, who is trained in pyrotechnics and performs as a magician.

"Fire is scary, you know," said Andrew of Heritage Park. "But he promised me I wouldn't burn my hand and I didn't."

Assistant director Linda Emerick said Cab Calloway school officials obtained special permits from the city fire marshal's office for the stunt.

Andrew will create the fire ball



Rachel Bleacher as Dorothy, Martin Griffith as the Scarecrow and Shene Prassey as the Tin Man go through a dress rehearsal of "The Wiz."

by striking together flint and steel, similar to a cigarette lighter, with a piece of cotton treated with chemicals. Emerick said she and Harrington practiced the stunt several times and performed it in front of fire marshals.

Said Emerick: "It is extremely safe. It burns so quickly and brightly, it doesn't even have a chance to get Andrew's hand warm ... It's cool."

Many in the cast agree, though Katie Brady said the funky winged monkey dance is better.

Danielle George and Cortne Mears, who play the skatin monkeys, are pleased.

"When I do a show, I like a lot going on," Cantrell said of the production, which is expected to cost \$8,000 to \$11,000. "I'm a real visual kind of person."

HONOR ROLL

Calloway students sing at namesake's memorial service

McKean FFA members win Delaware contest

Seventeen members of the McKean Future Farmers of America chapter recently won the state Build Our American Community contest and attended the 1994 National FFA Convention in Kansas City, Mo.

They are: Lucy Smith, Heather Sorragua, Patricia Madron, Tracy Mann, Renee Bender, Mary Shaver, Brian Warrick, Mike Bernardo, Dave Mensch, Stacy McCoy, Heather Martine, Rebecca Brabson, Melissa Thompson, Elizabeth Vondra, Janine Shelth, Erick Gropp and Jeff Stirk.

Keth Walker and Rodney Bailey are the advisers.

Mann and Madron accepted the Bronze National Award.

Sartford senior earns \$1,000 scholarship

Sartford School senior Earle McCartney, son of Earle and Anne McCartney of Pennsylvania, N.J., was selected as an Edward J. Bloustein Distinguished Scholar by the state of New Jersey. McCartney will receive a \$1,000 annual college scholarship.

By ESTEBAN PARIA
Staff reporter

More than 30 Cab Calloway School of the Arts students traveled to New York City last week and sang at their school namesake's memorial service.

The middle-school students were asked by the Calloway family to sing at the afternoon service on Nov. 28. The swing-era entertainer was proud of the school that bore his name.

Accompanied by vocational music director Martin Lessman on piano, the Calloway Select Chorus sang three contemporary Latin settings and "Kumbayah." They performed for nearly 3,000 people who gathered at the Cathedral of St. John the Divine — the same church where Calloway was baptized and confirmed.

"I guess I was kind of honored to go up there," said 12-year-old Dee Gravel. "We were representing our school."

Singing to that many people was a bit intimidating, Dee added. "I'm a shy person, so I was kind of scared," she said. "But I got used to it after a while because I knew everybody was up there ... to honor Cab Calloway."

Calloway died Nov. 18 at age 86 at Cokesbury Village retirement community in Hockessin after suffering a stroke in June at his home in White Plains, N.Y.

"Cab Calloway was probably proud of us because we were up there at his memorial service," said the seventh-grader, adding that she felt a bond with him.

"I don't know why I just did," Dee said. "I guess because I was going to a school that was named after him and I met him a few times and he was really nice."

Students at the school never really knew just how big a hit Calloway's "Minnie the Moocher" or "Hi De Ho Man" were. Some haven't even seen the 1980 movie "The Blues Brothers," in which Calloway played a guardian to Jake and Elwood Blues (John Belushi and Dan Aykroyd).

"I had heard of him," said 12-year-old Curtis Traver, who also sang at the memorial. "I like didn't really know that much about him."

He may have not know much of Calloway's past, but he knew and liked the man who would visit the school.

"I knew him very well after being in the school and every-

thing," Curtis said. "He was just nice to everybody."

Students realized how famous Calloway was when they saw stars such as Bill Cosby at his

memorial service.

"I guess when I found out just how incredibly big he was, it was like really amazing," Kristin Maynard, 14, an eighth-grader.

"He really acted like he was one of our equals instead of above us," she said. "He was like a grandfather to us."

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THE GIFT OF MUSIC

Chords of Calloway serenade residents at Cokesbury, including the widow of the late band leader for whom the group's school is named.

By TRACY LEIBERGER
LEONARDI
Special to The News Journal

HOCKESSIN — The Chords of Calloway are used to having big names in their audiences. The singers are young — they're in seventh and eighth grade — but they've performed before Gov. Carper and first lady Hillary Clinton, among others.

But there's something special about their annual visit to the auditorium of Cokesbury Village, where they entertained about 100 residents and prospective residents last week.

That's because the Cokesbury residents include Nuffie Calloway, the widow of the entertainer for whom the Chords' School of the Arts — is named.

The Chords' sweet-sounding, melodious voices filled the auditorium with joyful holiday music concert, much to the delight of Nuffie Calloway and the rest of the audience.

The performance opened with about 40 students, half of the Chords' troupe, singing and signing...

Peace, peace, peace, never-ending.

Joy, joy, joy overflowing.

Love, love, love everlasting true.

This is our gift for you...

The audience swayed with the rhythm. Nuffie Calloway beamed with pride. "It is very refreshing. These children are so well-trained and disciplined. We stress academics as well as the arts, and they are so wonderful and enthusiastic. These children are a part of my heart," she said.

"We actually have a large group, 70 students," said Marty Lassman, Calloway's arts team leader, vocal music instructor and Chords director. "We can't fit everyone on stage at once, so we have half perform at one show and half at another."



Stephanie Woods, a student at Cab Calloway School of the Arts, performs a dance routine as the chorus sings for residents of Cokesbury Village.



Nuffie Calloway, Cab's widow, stands with the Chords at Cokesbury.

guage such words as "hep," "jive," and "square" and popularized the zoot suit. A Cotton Club star in the 1930s, a Hollywood movie star in the 1940s and a Broadway star in the 1950s, Calloway also made concert tours to Europe and Asia. For all his fame, Calloway was a generous man with a warm heart and enjoyed spending time with the kids at the school that bears his name.

"One of the students told a reporter that he wasn't Mr. Calloway the star, but more like Grandpa," Nuffie Calloway said. "My husband loved the school and the children. They're my children now."

The Calloway School opened at the Wilmington High School campus in 1982. It offers a curriculum of arts and academics to grades six through 10, and will add one grade each year to grade 12.

The Chords have performed at a host of schools, senior centers and commercial locations.

"The kids practice three times a week during class, and then

there is an after-school rehearsal, at least once a week," said Lassman.

The hour-long program at Cokesbury was a magnificent blend of singing and choreography. The troupe performed Renaissance madrigals, classical music, pop and seasonal pieces. It was joined by members of the school dance company for several collaborative pieces.

"This has been just wonderful," said Lydia Szyka, public relations coordinator for Cokesbury Village. "Our residents really enjoyed it."

Cokesbury, owned and operated by Peninsula United Methodist Homes Inc., has been in operation since October 1978. It offers 252 living units, 108 cottages and 14 apartments, and a full health-care facility for people age 60 or older. The community is also home to a country store, beauty shop, gift shop, post office, bank, dining room and an abundance of meeting rooms.

EXHIBIT 7

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C-16	CCSA LANYARD KEY CHAIN		\$ 5.00
C-17	CABBY SHORTS - SILKSCREENED "CAB" ON BACKSIDE	S M L XL	\$20.00
C-18	CAB HOODIE - CUSTOM LOGO & DESIGN	M L XL XXL	\$40.00
C-19	CAB HOODIE SWEATPANTS - NO LOGO	S M L XL	\$10.00
C-20	SILKSCREENED CLASS TEE SHIRT - 2006	M L	\$10.00
C-21	SILKSCREENED CLASS TEE SHIRT - 2007	M L	\$10.00
C-22	CCSA LOGO GOLF SHIRT	S M L XL	\$30.00
C-23	CABBY KIDS BIB		\$10.00
C-24	CABBY KIDS INFANT ROMPER	6 mos. 12 mos. 18 mos. 24 mos.	\$20.00
C-25	CABBY KIDS TODDLER OR YOUTH SWEATSHIRT	Indicate size:	\$22.00

*SEE SEPARATE HOODIE ORDER FORM FOR CUSTOMIZING CHOICES

ANY ITEM MAY BE CUSTOMIZED WITH AN EMBROIDERED NAME
OR YEAR OF GRADUATION FOR AN ADDITIONAL FEE OF \$5.00

CUSTOMIZING INSTRUCTIONS: _____

TOTAL NUMBER OF ITEMS ORDERED: _____

TOTAL COST: _____

THANK YOU FOR YOUR ORDER! YOU WILL RECEIVE A PHONE CALL WHEN IT IS READY. IF YOU HAVE ANY QUESTIONS, CALL NANCY WINN AT 239-6537. MAKE CHECKS PAYABLE TO CCSA PTSA. PURCHASES MUST BE PAID FOR AT THE TIME THEY ARE ORDERED. IF YOU WISH, YOU CAN MAIL ORDER FORMS TO NANCY WINN AT 34 TRIMBLE TURN, HOCKESSIN, DE, 19707.

PARENT NAME: _____

STUDENT NAME: _____

HOMEROOM: _____

HOME PHONE: _____

WORK PHONE: _____



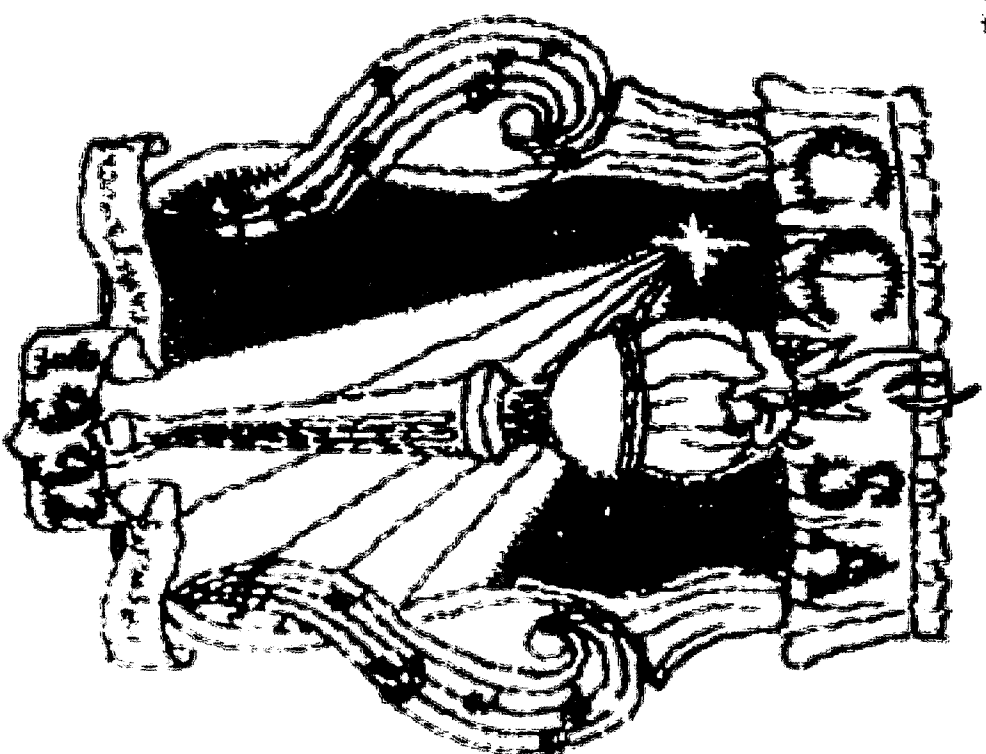


Cab Calloway



School of the Arts

Cab Calloway

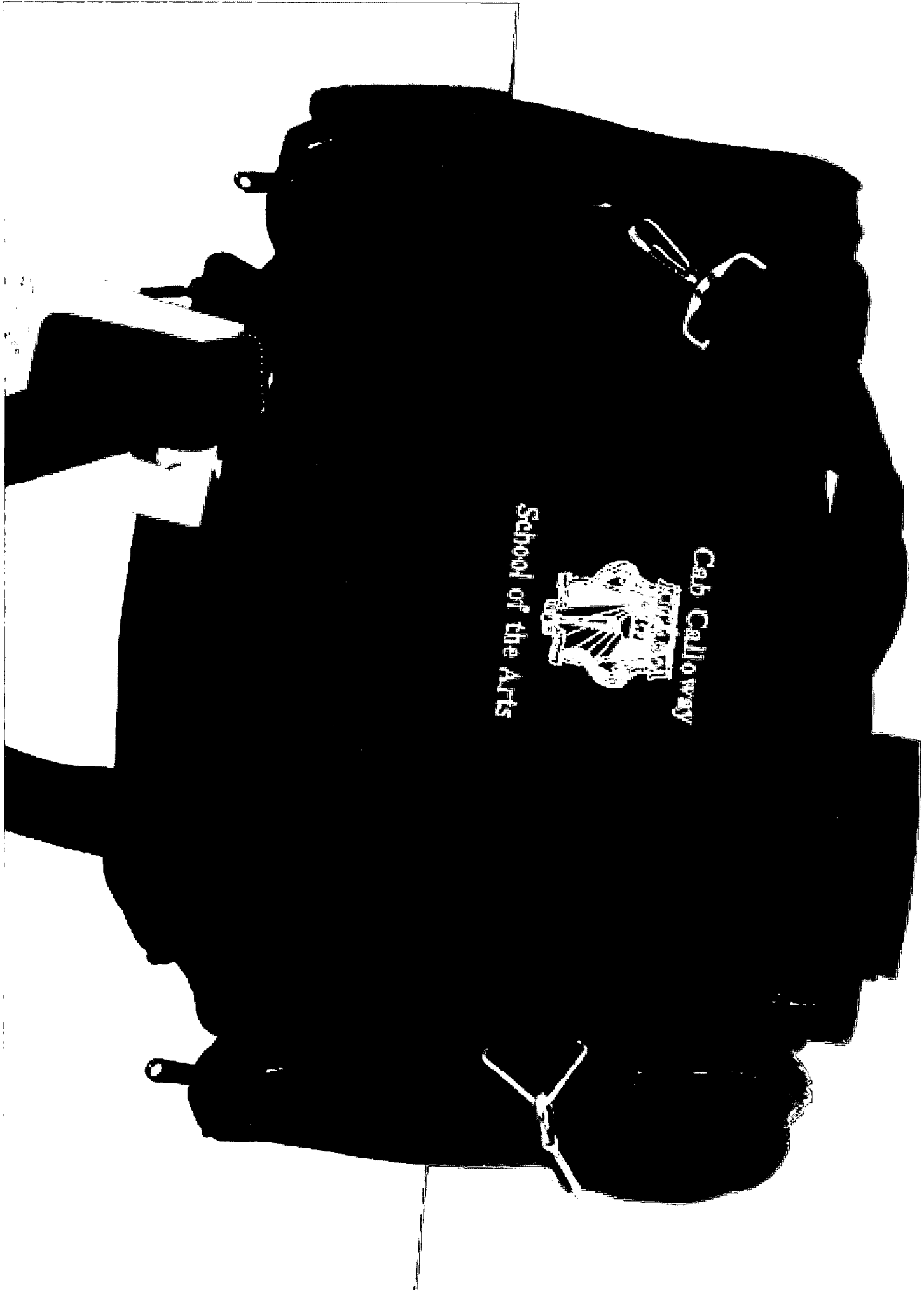


School of the Arts





CAB





CAB CALLOWAY

School of the Arts



EXHIBIT 8

Cab Calloway Scholarships



Logo by Arthur Singer

**Cab Calloway School Fund
P.O. Box 4642
Wilmington Delaware 19807**

Cab Calloway Scholarships

The Cab Calloway Arts Enrichment Scholarship

This program was created by MBNA in 1995 to honor the legendary Cab Calloway. These competitive scholarships range up to \$2000 per student and can be used for any arts subject taught at Cab Calloway School. Students in 7th through 11th grade are eligible to apply. The intention is to enrich the arts education of CCSA students, especially over the summer when CCSA is not in session but when highly rated summer programs are offered locally and nationally. The number and size of awards depends on how much interest the endowment has earned.

The Vincent J. Poppiti Music Scholarship **(For year 2005 only)**

This program was started by the CCSA Advisory Board in 2003 to honor its long time president on his retirement from the Board. This competitive scholarship will fund private vocal or instrumental music lessons for a Cab student with financial need. The lessons must be in the student's major. This year the Poppiti Fund will provide one award of \$1000 to one seventh or eighth grade student in vocal or instrumental music for the year 2005 only. This should provide from 25 to 50 weekly one-on-one lessons, depending on the teacher's rate.

Administration

Both these scholarships are now administered by the Cab Calloway School Fund in connection with the CCSA Advisory Board. The Cab Calloway School Fund is a non-profit corporation created to support the missions of the Cab Calloway School of the Arts and is separate from the school itself.

Your application is confidential and will be reviewed only by members of the Scholarship Committees. Cab Calloway Scholarships does not discriminate on the basis of age, race, color, national or ethnic origin, disability, gender, or sexual orientation in its scholarship review process or any other scholarship program activity.

Eligibility Requirements for Both Scholarships

All applicants must be currently enrolled at Cab Calloway School of the Arts. Scholarships are not valid if the student is no longer enrolled.

Cab Calloway Arts Enrichment Scholarship request does not have to be in the student's major. It can be used for any arts subject taught at Cab Calloway School. Applicants must be in 7th through 11th grade.

Poppiti 2005 Scholarship applicants must be vocal or instrumental music majors in 7th or 8th grades. The music lessons must be in their major. A list of recommended teachers is available.

Scholarship funds are limited. Awards are based on merit and financial need.

Selection

An application packet must be completed according to the stated instructions and include supporting materials, grade reports, and tax documents. It must be signed by the student applicant and parent or guardian of the applicant, and mailed directly to the Cab Calloway Scholarship Programs **no later than April 18**.

Recommendation forms may be sent directly by the teacher.

Parents shall submit their most recent Federal Tax Return (Form 1040) -- 2004 or, if that doesn't yet exist, 2003. If you do not file a tax return please call Richard Quisenberry 302-633-9259, in confidence. This information is used to calculate financial need. Neither the Selection Committee nor the Cab Calloway School will review your private tax records. It is held in strict confidence

The scholarship selection committee will not review incomplete applications.

The Cab Calloway Scholarship Programs are not responsible for late, lost, or misdirected mail.

An independent scholarship selection committee will make scholarship decisions by **May 27th**.

Scholarship Awards

Scholarship awards are for tuition, cost of lessons, and if provided as part of a residency program, for room and board. If you have special costs, please itemize them for the committee to consider.

Cab Calloway Arts Enrichment Scholarships are awarded up to \$2,000. The maximum award in any school year is \$2,000 per student. The amount is dependent upon merit, the cost of the request, and other resources available to the applicant. The Poppiti Scholarship (for year 2005 only) is for \$1000.

Scholarship payments will be made directly to the supplier of the service. Reimbursement can be made for expenses already incurred to meet deadlines for upcoming arts programs if receipts or cancelled checks are provided.

Awards will not be granted for programs already begun. Awards are valid only for the intended use stated in the scholarship award letter.

Scholarship awards are non-transferable.

All claims for scholarship payment must be made within six months of incurring the expense.

~Continued on the back~

Cab Calloway Scholarships 2005 Important Information

As you complete your application, keep in mind:

Research and Preparation

- ◆ Discuss your scholarship request with your arts teacher. If you are applying for both scholarships (7th or 8th grade only) you may need to consult two different teachers. Ask for help finding the best program. Comparison-shop – Find the best program at the best price.
- ◆ Ask the arts teacher to recommend you (form is provided in application packet). The teacher should be your instructor in the arts area for which you are applying. Allow enough time for the teacher to write a thorough recommendation and send it before the deadline. The teacher can also give it back to you in a sealed envelope. In that case you must include it in your packet to us.
- ◆ Investigate other sources of funding.

Filling out the Application

- ◆ **Applications must be postmarked or received by April 18**, and scholarship decisions will be determined by May 27. Apply early. If we determine that something is unclear or missing from your application, you may have time to fix it before the final deadline.
- ◆ **Complete your own application.** Your parents have a section to complete (Parent Information), but they should not complete the whole application for you.
- ◆ **Use blue or black ink**, not pencil, when completing the application. Pencil does not photocopy well. Make sure your answers are spelled correctly and legibly. Neatness counts.
- ◆ **Answer all of the questions** – do not leave blanks. Sell your unique skills and aspirations.
- ◆ You must enclose a copy of your most recent grade report.
- ◆ Parents shall use their most recent federal tax return (Form 1040) for this application -- 2004, or if that doesn't yet exist, 2003.

Scholarship-Specific Questions

Theresa Matthews at (302) 652-3702

Linda Welsh at (302) 235-2080

Applications must be postmarked or received by April 18.

A pre-addressed return envelope is enclosed in the application packet. If you do not have the envelope, mail completed application to:

*Cab Calloway School Fund
P.O. Box 4642
Wilmington DE 19807
Attention: Scholarships*

Course/Program Information Form

Cab Calloway Scholarships Application

(TO BE COMPLETED BY THE STUDENT, PARENT, OR SPONSORING ORGANIZATION)



Applicant's Name _____
First Middle Last

Include this form with the scholarship application This form must be postmarked or received by April 18 to receive scholarship consideration.

The Cab Calloway student named above is applying for an arts scholarship. Scholarships are awarded to complete specific, arts-related instruction in the performing, visual, or communication arts. Awards pay for tuition, cost of lessons, and if provided as part of a residency program, for room and board. To accurately assess financial need, we ask the applicant to itemize the expected costs associated with completing their chosen program. Attach additional supporting material to justify costs (i.e. rate sheets, registration form, etc).

Describe the program / course/ lessons offered to this applicant.

Program Dates _____ to _____

Student Status ☐ admitted to program ☐ under consideration ☐ expressed interest

This program will meet ☐ daily ☐ weekly ☐ Other

The Cab Calloway Scholarships Program makes payment upon program completion or on a periodic basis with an invoice from the service provider. We will send a commitment letter in advance if this applicant is awarded funds from the scholarship program.

Program/Course Name _____

Person/Institution offering program:

Address: _____

City: _____ **State:** _____ **Zip:** _____

Contact Person: _____

Title: _____

Phone: _____

E-Mail: _____

OVER

Scholarship Worksheet

Complete all relevant costs below. If a cost does not apply to your program please put "N/A".

Program Costs

Tuition _____ (Enclose copy of fee schedule provided by sponsoring organization)

Private Lessons _____ (Rate per hour: _____ Total hours: _____)

Room & Board _____

Other _____ (Specify: _____)

Total Program Cost _____ **(A)**

Contributions

Parents _____

Financial Aid _____

Student _____

Other Resources _____

Total Contribution _____ **(B)**

Amount Needed _____ **(A minus B)**

Use this section to itemize or explain figures listed above. Enclose copies of available price information. Also indicate what comparison/price shopping was conducted to make this program choice.

Artistic Recommendation Form Cab Calloway Scholarship Application

(TO BE COMPLETED BY MOST RELEVANT CAB CALLOWAY ARTS INSTRUCTOR)



APPLICANT'S NAME _____

First

Middle

Last

This Cab Calloway student is applying for an arts scholarship. In addition to information requested from the applicant, we ask for a recommendation from his/her arts instructor who can address the student's seriousness and commitment. Your evaluation will become part of the applicant's confidential file, intended for use only by the Cab Calloway Scholarships Selection Committee. **Please return this form in a sealed, signed envelope to the applicant or send directly to the address given.**

This recommendation is for :

____ Cab Calloway Arts Enrichment Scholarship

____ Vincent J. Poppiti Music Scholarship

Please Print:

Your Full Name: _____

Your Arts Field: _____

Telephone/E-Mail: _____

Length of
Relationship: _____

Has the student discussed this scholarship request with you? In what specific ways will the requested program enhance his/her artistic abilities?

OVER

Which personal qualities stand out in the applicant? Are there any features in the applicant's background that will help us better understand him/her? Are there any personal strengths, weaknesses, or problems about which you feel we should be aware?

Please respond to the following:

	Yes	No
This student regularly attends classes and rehearsals on time.	<input type="checkbox"/>	<input type="checkbox"/>
This student is enthusiastic about studying the arts.	<input type="checkbox"/>	<input type="checkbox"/>
The student's chosen program is the best, most cost-effective instruction available.	<input type="checkbox"/>	<input type="checkbox"/>
This student makes full use of artistic resources already available.	<input type="checkbox"/>	<input type="checkbox"/>

Please explain any "No" responses. Additional Comments?

Signature: _____

Date: _____

Please return this form in a sealed, signed envelope to the applicant or send directly to the address given. This form must be postmarked or received by April 18 to receive scholarship consideration.

Please return to: Cab Calloway School Fund
Box 4642
Wilm DE 19807

Attention: Scholarships

OVER

Cab Calloway Scholarships Application

Student Information

To be completed by the student

Legal Name of Applicant:

First

Middle

Last

Permanent Home Address:

Current Grade Level (this year, spring 2005) _____

Art Major _____ Minor (if any) _____

Scholarship(s) Applied for:

_____ Cab Calloway Arts Enrichment Scholarship

7th through 11th grade, any art field taught at CCSA

_____ Vincent J. Poppiti Music Scholarship (Only applies to year 2005)

Current 7th or 8th grade, vocal or instrumental music. One award of \$1000. will be made for music lessons from a private teacher. A list of recommended teachers is available.

_____ Vocal _____ Instrumental Instrument Played _____

If you apply for both scholarships, you may need to fill out separate course/program information, have separate recommendations and essays. For example, your visual arts teacher cannot recommend you for the Poppiti Music Scholarship, but could recommend you for a visual arts course under the Cab Calloway Arts Enrichment Scholarship. We would need separate course/program descriptions and recommendations, and separate essays for topics 1 and 2).

Short Essays: Please complete the following information in your own words on a separate sheet of paper. Typed answers are preferred.

1. Very briefly describe the program, course or lessons you will use the scholarship(s) for.
2. How will the program(s) you just described help you to pursue your goals?
3. List your activities, honors and performances since becoming a Cab Calloway student.

Please also send along with this application:

Your Latest Grade Report

Artistic Recommendation Form(s) by your most relevant CCSA arts teacher(s) - in packet

Course/Program Information Form(s) - in packet

Any supporting materials (Program brochures, or rate sheet for example)

-OVER-

Legal Name _____

First

Last

Relationship to Applicant

Daytime Phone Number _____ E-mail: _____

[illegible]

If you file a Federal Income Tax Return (Form 1040) on which this applicant is claimed as a dependent, please enclose a copy of the front and back (2003 or 2004, if available). If you do not file a tax return please call Richard Quisenberry 302-633-9259, in confidence. This information is used to calculate financial need and held in strict confidence by the Fund administration. The Selection Committee and the Cab Calloway School will not review your private tax records.

If so, please explain.

Please review the application to ensure that you have answered all the questions completely and accurately. Review the application checklist below to ensure that all required documents are submitted. Failure to provide complete and accurate answers may disqualify your application. A scholarship may be revoked, at any time, if it was awarded based upon inaccurate or incomplete information. Scholarships are not transferable.

Applicant's Signature (Student)

Parent's or Guardian's Signature

Checklist: ☐ Completed and Signed application ☐ Student Essays on separate page
☐ Artistic Recommendation Form ☐ Program Information Form and Supporting Materials
☐ Latest Grade Report ☐ Copy of latest Federal tax form (2003 or 2004)

EXHIBIT 9

LAST WILL AND TESTAMENT

OF

19943271

CABELL CALLOWAY

I, CABELL CALLOWAY, residing at Elmsford, Westchester County, New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all wills and codicils heretofore made by me.

FIRST: I direct that all my just debts and funeral expenses be paid as soon after my death as may be practicable.

SECOND: I give, devise and bequeath all of my property and estate, real, personal and mixed, of whatever kind and wheresoever situate, which I shall own at my death or in any way be entitled to at my death or to which my estate shall become entitled to receive after my death, as follows:

(a) To my wife, Zulme McNeal Calloway, if she survives me, including all royalties and residuals or other payments or rights to payment for the reproduction of my performances or any songs or lyrics or both in which I have any ownership or other rights.

(b) If my wife, Zulme McNeal Calloway, predeceases me or should we die as the result of a common accident or disaster or under such circumstances that it cannot be determined which of us died first, I give to my daughter, Camay Brooks, Five Thousand dollars (\$5,000) and I give, devise and bequeath all the rest and remainder of my said estate to my children Christopher Calloway, Cabella Calloway Langsam and Cecelia Eulalia Calloway in equal shares provided however, that if any of my said children predecease me, her share shall be divided equally among my surviving children.

THIRD: In the event that a beneficiary of mine and I shall die in a common accident or disaster or under such circumstances that it is difficult or impossible to determine who survived the other, then I direct that for the purposes of this will, said beneficiary shall be deemed to have predeceased me.

~~FOURTH:~~ I nominate and appoint Denis Boyle, to be the executor of this will and trustee of any trust created hereunder. I direct that any executor or trustee appointed by me be exempt from the requirement of furnishing a bond or other security.

FIFTH: I hereby grant and confer upon my executor and trustee, with respect to my estate or any trust created hereunder, in addition to any powers now or hereafter provided by law, the following powers with respect to the investment, management and administration of any and all property, whether real or personal, of my estate (including any property which may be held in a power or in trust by my executor or trustee) to exercise such powers as he, in his absolute discretion, may deem advisable, without any authorization from any court:

(a) to retain any property, real or personal, owned by me at the time of my death, without any duty to diversify the property and whether or not the property may be authorized by law as an investment for estate or trust funds;

(b) to invest and reinvest in any stocks, bonds, securities or other property, real or personal, without any duty to diversify and whether or not the property may be authorized by law as an investment for estate or trust funds;

(c) to sell, option, exchange, partition, lease for any term, mortgage, or otherwise dispose of any of the property, real or personal, at public or private sale, for cash or credit, and upon such terms as he may deem advisable and to execute any and all documents and papers in connection therewith;

(d) to borrow money from any person (including any executor hereof) for any purpose, in such amount and upon such terms including rates of interest, as he may deem advisable;


(e) to compromise, settle, adjust or arbitrate claims;

(f) to renew, release or extend the term of any obligations, secured or unsecured, held or owed, for such time and upon such terms, with or without consideration as he may deem necessary;

(g) to make distributions hereunder either wholly or partly in kind or in cash;

SIXTH: (a) If pursuant to this will any property shall become payable or distributable absolutely to a minor, the property shall belong to and vest in the minor absolutely, notwithstanding his or her age, but my executor may, in his absolute discretion, retain the property under a power in trust in a separate fund for the benefit of such minor, invest and reinvest the same, collect the income therefrom and apply so much of the net income and principal as he deems necessary for the support, maintenance, education or use of the minor, accumulating the balance of the net income, if any, upon the minor attaining his or her majority, the remaining principal (and any accumulated income and interest) belonging to the minor shall be paid over to his or her legal representative as part of his or her estate.

(b) Any income or portion of principal to be applied for the use or benefit of a minor under the provisions of this will may be so applied by my executor either directly or by making payment, without bond, to the minor or to a parent of the minor, or to a guardian of the minor or the property of the minor, in which event the receipt by the minor, parent or guardian, as the case may be, shall be a complete discharge to the executor making the payment; the parent or guardian need not be legally appointed the guardian of the minor, nor shall the minor, parent or guardian be obligated to give any accounting for the disposition of said income or principal; except upon the written request of the executor hereunder. In determining the amount of income or principal to be applied for the use or benefit of a minor under the provisions of this will, my executor may in his sole discretion, either disregard or take into account to the extent he deems advisable the amount of income receivable by the minor from other sources, or the amount of the minor's independent property, or the extent to which the minor may be entitled to support by a parent or other person.



(c) For purposes of this will, the words "minor" or "majority" shall mean or refer to a person or a class of persons under the age of twenty-one (21) years or who shall have reached said age, according to the context.

SEVENTH: I direct that all estate, inheritance, succession and transfer taxes and other death duties, including any interest or penalties thereon, imposed or payable by reason of my death upon or in respect of any property passing under my will and required to be included in my gross estate for the purpose of those taxes, be paid out of my estate as an administration expense and

not be apportioned.

IN WITNESS WHEREOF, I have hereunto set my hand to this my Last Will and Testament, consisting of this page and the 3 preceding typewritten pages initialed by me at the left margin thereof, in the presence of the two persons who have at my request and in my presence and the presence of each other acted as witnesses this 1st day of OCTOBER 1991 at 1023 KIRKWOOD ROAD, WHITE PLAINS, N.Y.

Cabell Calloway III
CABELL CALLOWAY

© The foregoing instrument, consisting of four pages, including this page, was, on the date hereof, signed, published and declared by the testator as and for his Last Will and Testament in our presence and the undersigned in the presence of the testator and of each other, have hereunto subscribed our names as witnesses.

[Signature] residing at 458 3rd St.
Brooklyn, NY
[Signature] residing at 433 West 34th St.
NYC 10001

EXHIBIT 10



Cab Calloway Foundation

110 East 59th Street, New York, NY 10022

Tel: 212-909-0415

Fax: 212-909-0416

THE CAB CALLOWAY FOUNDATION

Mission Statement

The primary objectives and purposes of the Cab Calloway Foundation, a not-for-profit corporation, shall consist of:

Sponsorship, development or operation of educational programs created to encourage and foster cultural and ethnic diversity;

benefits and information for the public about the music and legend of Cab Calloway, his contributions to history, jazz and other art forms in all media;

all acts necessary or appropriate in connection with the foregoing objectives and purposes.

Specific objectives of the Cab Calloway Foundation include, but are not limited to the following:

The Cab Calloway School of the Arts in Wilmington, Delaware ensures that school children and young adults are given the chance to explore the arts while instilling in them the discipline that is needed to be both creative and academic.

The Music Conservatory of Westchester in White Plains, New York administers The Cab Calloway Jazz Star of Tomorrow Scholarship, which is awarded annually to talented, financially deserving students age twelve through eighteen for advanced musical training. The scholarship provides musical training for students pursuing musical education in the tradition of the great American Jazz musicians that preceded them.

The Cab Calloway Memorial Pond at the Sanford School in Hockessin, Delaware provides students and faculty with a quiet location on the campus for a peaceful interlude during the day. A memorial plaque at the pond educates ongoing generations of students about the contributions of this legendary American entertainer and his global legacy in the world of music and drama.

The Cab Calloway Hi-De-Ho Jazz Festival is planned for an East Coast 1998 debut. This annual event promises to be rich in musical history - featuring some of today's giants in Jazz, Be-Bop, Big Band, Swing and vocal performance, as well as contemporary artists who have benefited from studying this legendary artist. The festival will provide needed funds to maintain the foundation's continuing programs and help underwrite the development of new arts and educational programs.

The Cab Calloway Jazz Tour Memorial will embark on its inaugural domestic and international tour in 1999. As a multi-media presentation of Cab Calloway as performer, musician, writer, bandleader, actor and fashion icon of his period, the tour will entertain and remind audiences around the world of the legendary genius of this great American performer. Funds raised will provide support for the historical preservation of American jazz libraries, catalogs and other art forms.

MRS. CAB CALLOWAY'S COCKTAIL RECEPTION

for the

CAB CALLOWAY FOUNDATION KICK-OFF

PLANET HOLLYWOOD, NEW YORK CITY, NOVEMBER 18, 1997

EVENING PROGRAM

Welcome

Camay Calloway Murphy
and
Cecelia Calloway, Daughters

Mrs. Cab Calloway Welcome and Program Introductions

Co-host Ms. Ruth Warwick
Cabella Calloway Langsam, Daughter and Foundation CEO

Cabella Calloway Langsam Presentation

Cab Calloway Foundation
Executive Members
Cab Calloway white suit worn in
"The Blues Brothers" movie to Planet Hollywood

Cab Calloway School of the Arts Select Chorus Performance

Chris Calloway Performance with Band Members

Ted Curson, trumpet
Frank Derrick, drums
Milt Hinton, bass
Danny Hogate, piano
Earl May, bass
Max Roach, drums

Closing Songs

"Minnie the Moocher"
"Hi-De-Ho"



HOST COMMITTEE

Honorable David Dinkins
Morgan Freeman
Spike Lee
David Ushery

SPECIAL THANKS

Co-host
Ruth Warwick

Planet Hollywood Staff
Scott Cronin, General Manager
Karen J. Bailey, Public Relations Director
Cheryl L. Englehardt, Sales Manager

Photographer
Leroy Henderson

Musicians & Vocalists
Chris Calloway
Ted Curson
Frank Derrick
Milt Hinton
Danny Hogate
Earl May
Max Roach
Ted Williams

Cab Calloway School of the Arts Select Chorus

Volunteers
Linda Clark
Jennifer Jones
Gigi Parvilus
Leslie Powell
Brenda Thomas
Gregory Thomas
Jackie Williams

A Special thank you to all the Media, Journalists & Reporters

EXHIBIT 11

ASSIGNMENT

WHEREAS, Zulme M. Calloway ("Assignor") is the widow and sole legal heir of the deceased Cab Calloway (born Cabell Calloway, III on December 25, 1907), Cab Calloway having bequeathed all of his property and estate, real, personal and mixed, of whatever kind, to Assignor;

WHEREAS, pursuant to a Settlement Agreement with Mutual Releases (the "Settlement Agreement"), dated July 5, 2000, by and among Sawmill Entertainment Corporation, Ron Rainey Management, Inc., Calloway Entertainment, Inc., Richard L. Albert and Ron Rainey (collectively, the "Rainey Parties") and Zulme Calloway and Cabella Calloway Langsam, individually and as guardian ad litem for Zulme Calloway, the Rainey Parties reconveyed to Assignor certain rights in and to certain musical compositions, and the exclusive worldwide rights to the likeness, voice and caricature of Cab Calloway allegedly conveyed to them by Cab Calloway and Zulme Calloway;

WHEREAS, Zulme M. Calloway is presently the sole member of, and will be an initial member of the board of managers of, Creative Arts by CALLOWAY, LLC, a Delaware limited liability company that will or may conduct business under the name C.A.B. CALLOWAY, LLC ("Assignee"); and

WHEREAS, Zulme M. Calloway has formed Assignee for the purpose of managing, promoting, licensing and otherwise dealing with all of the rights associated with the name, likeness, voice and intellectual property rights belonging to Cab Calloway at his death and/or transferred or restored to Zulme M. Calloway pursuant to the Settlement Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor does hereby transfer, assign and convey to Assignee and its legal successors and assigns, without reservation:

- (1) One Hundred Percent (100%) of her right, title and interest in and to the appearance, persona, likeness, image, form, caricature, expression and voice of Cab Calloway and characters created by him and all rights of publicity relating thereto, including but not limited to the exclusive worldwide right in perpetuity to exploit, market, merchandise, advertise, promote, license and sell interests therein and products and services of every kind and nature;
- (2) the trademarks or service marks "Cab Calloway," "Hi De Ho Man," "Minnie the Moocher" and all other marks based upon the name, image, signature or likeness of Cab Calloway, and all derivatives thereof, and all pending applications and registrations relating thereto and all renewals and extensions thereof for the United States of America and all countries of the world, together with the goodwill associated therewith and any and all claims or causes of action whether asserted or not relating thereto, including the right to recover damages on account of infringement thereof regardless of the date of infringement;
- (3) an undivided One Hundred Percent (100%) interest in Assignor's interest in copyright and all other right, title and interest in and to all musical compositions in which Assignor has

on Schedule A hereto and by this reference made part hereof, including but not limited to, the copyright and all renewals and extensions thereof for the United States of America and all countries of the world and any and all claims or causes of action whether asserted or not relating thereto, including the right to recover damages on account of infringement thereof regardless of the date of infringement; and

- (4) all contracts, agreements, licenses or other arrangements relative to any of the preceding, and all rights to royalties or other income relating thereto.

Assignor acknowledges her intention to transfer to Assignee all of her right, title and interest in and to all rights relating to or arising out of the artistic endeavors of Cab Calloway and agrees, which agreement shall be binding upon her heirs and successors in interest, to make any further assignment, in whatever form required or to execute and further document that may be necessary in order to further perfect or effectuate the intent of this assignment.

The undersigned executed this instrument on this 22nd day of January, 2001.

Zulme M. Calloway
ZULME M. CALLOWAY

STATE OF DELAWARE)
) SS:
NEW CASTLE COUNTY)

BE IT REMEMBERED that on this 22nd day of January, 2001, personally appeared before me, a notary public under Delaware law, Zulme M. Calloway, party to the foregoing instrument who, having been duly sworn, acknowledged that the same was her act and deed.

Lisela M. Chambers
Notary Public

My commission expires: October 28, 2003

Schedule A

- | | |
|--|---------------------------------------|
| 1. "Minnie the Moocher" | 23. "Chop, Chop, Charlie Chan" |
| 2. "Scat Song" | |
| 3. "Lady with the Fan" | 24. "Are You Hep to the Jive?" |
| 4. "Get that Hi-De-Ho in Your Soul" | 25. "Boogit" |
| 5. "Chinese Rhythm" | 26. "Come On with the Come On" |
| 6. "Good Sauce from the Gravy Bowl" | 27. "Do I Care? No, No" |
| 7. "Echoes" | 28. "Silly Old Moon" |
| 8. "Are You in Love with Me Again?" | 29. "Sunset" |
| 9. "Big-Mouth Minnie" | 30. "Topsy Turvey" |
| 10. "That Man's Here Again" | 31. "Are You All Reet?" |
| 11. "Peek-A-Doodle-Do" | 32. "The Workers' Train" |
| 12. "A Minor Breakdown" | 33. "Hot Air" |
| 13. "I Like Music" | 34. "Virginia, Georgia, and Carolina" |
| 14. "Rustle of Swing" | 35. "Levee Lullaby" |
| 15. "Three Swings and Out" | 36. "Nein, Nein" |
| 16. "Rhapsody in Rhumba" | 37. "Cy from Chi" |
| 17. "I Like Music Played with a Swing Like This" | 38. "Geechy Joe" |
| 18. "Jive" | 39. "Ogeachee River Lullaby" |
| 19. "The Jumpin Jive" | 40. "Let's Go, Joe" |
| 20. "We're Breaking Up a Lively Affair" | 41. "Pitchin' Up a Boogie" |
| 21. "For the Last Time I Cried Over You" | 42. "Special Delivery" |
| 22. "I Ain't Gettin Nowhere Fast" | 43. "The Jive's Been Here and Gone" |
| | 44. "The Great Lie" |

- | | | | |
|-----|-----------------------------|-----|----------------------------------|
| 45. | "Jonah Joins the Cab" | 61. | "I Loves You, Honest I Does" |
| 46. | "We the Cats Shall Help Ya" | 62. | "Going Where I Can Do Some Good" |
| 47. | "Foo a Little Bally Hoo" | 63. | "Let's Call It Quits" |
| 48. | "My Lovin' Baby and Me" | 64. | "Maybe It's Dinah" |
| 49. | "Frantic in the Atlantic" | 65. | "Old Man Bounce" |
| 50. | "Glider" | 66. | "Get Back on the Road" |
| 51. | "On Account of Love" | 67. | "He-Do-Ho Man, That's Me" |
| 52. | "If This Isn't Love" | 68. | "Don't Falter at the Alter" |
| 53. | "Zanzi" | 69. | "Minnie Grew Up Overnight" |
| 54. | "My Lament for V-Day" | 70. | "Fiesta in Brass" |
| 55. | "Rackin' em Bank" | 71. | "Ole Hops" |
| 56. | "Trumpetology" | 72. | "Calloway Boogy" |
| 57. | "Crusin with Cab" | 73. | "That's The Least, Don't You" |
| 58. | "I Got a Gal Named Nettie" | 74. | "Bop Blues" |
| 59. | "Hey Now, Hey Now" | 75. | "Rhythm Cocktail" |
| 60. | "How Big Can You Be" | | |

EXHIBIT 12

GEAR INK
715 BORDEAUX ST.
NEW ORLEANS, LA 70115

ROYALTY REPORT - 02/01/2005 through 02/28/2005

CAB CALLOWAY
C/O CABELLA C LANGSAN
405 REGENCY COURT
HOCKESSIN, DE 19707-2300

CODE	ITEM	PRICE	ROY. RATE	QTY	EXTENSION
0209WHM	CAB CALLOWAY	MD			

Total Royalties for CAB CALLOWAY

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 75761159
Mark: CAB CALLOWAY
Applicant: CREATIVE ARTS BY CALLOWAY, LLC

----- x

CHRISTOPHER BROOKS,	:	
	:	
Opposer	:	
	:	
v.	:	Opposition No. 91160266
	:	
CREATIVE ARTS BY CALLOWAY, LLC,	:	
	:	
Applicant.	:	

-----x

**DECLARATION OF JOEL D. LEVITON
IN SUPPORT OF APPLICANT'S OPPOSITION TO
OPPOSER'S MOTION FOR SUMMARY JUDGMENT**

I, Joel D. Leviton, declare and state as follows:

1. I am an attorney with Fish & Richardson P.C., P.A. in Minneapolis, Minnesota, and am counsel for Applicant Creative Arts by Calloway, LLC.
2. This Declaration is submitted in support of Applicant's Opposition to Opposer's Motion for Summary Judgment.
3. Attached hereto as Exhibit 1 are true and correct copies of excerpts from Christopher W. Brooks' Brief filed with the United States Court of Appeal for the Second Circuit in *Creative Arts by Calloway, LLC v. Christopher W. Brooks*, No. 02-7050.
4. Attached hereto as Exhibit 2 are true and correct copies of excerpts from Christopher W. Brooks' Memorandum of Law in Support of Defendant's Motion for Summary Judgment and In Opposition to Plaintiff's Motion for a Preliminary Injunction filed with the United States District Court for the Southern District of New York in *Creative Arts by Calloway, LLC v. Christopher W. Brooks*, No. 01 CIV. 3192 (BDP).

5. Attached hereto as Exhibit 3 are true and correct copies of excerpts from Christopher W. Brooks' Memorandum of Law in Further Support of His Motion for Summary Judgment filed with the United States District Court for the Southern District of New York in *Creative Arts by Calloway LLC v. Christopher W. Brooks*, No. 01 CIV. 3192 (BDP).

6. Attached hereto as Exhibit 4 is a true and correct copy of the Declaration of Bob Bass, submitted by Christopher W. Brooks in support of his Motion for Summary Judgment in the action before the United States District Court for the Southern District of New York.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 28th day of June, 2005, at Minneapolis, Minnesota.

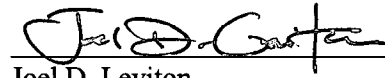

Joel D. Leviton

EXHIBIT 1

02-7050

In the
United States Court of Appeals
for the Second Circuit

CREATIVE ARTS BY CAL, d/b/a C.A.B. CALLOWAY, LLC,

Plaintiff-Appellant,

-against-

CHRISTOPHER W. BROOKS, d/b/a THE CAB CALLOWAY ORCHESTRA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

BARBARA A. SOLOMON, ESQ.
EVAN C. GOURVITZ, ESQ.
FROSS, ZELNICK, LEHRMAN & ZISSU, P.C.
Attorneys for Defendant-Appellee
866 United Nations Plaza
New York, New York 10017
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services. 15 U.S.C. § 1127 (definitions of “trademark” and “service mark”); *see Pirone*, 894 F.2d at 583 (purpose of a trademark is to designate source of a product). Unlike a personal name which merely identifies a person, and therefore cannot exist independent of the person, a trademark identifies and refers to the goodwill of a commercial enterprise. *See, e.g., Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984) (“[a] trade name or mark is merely a symbol of goodwill [t]here are no rights in a trademark apart from the business with which the mark has been associated”). By way of example, Michael Jordan, Paul Newman and Kenny Rogers are all personal names identifying well-known celebrities and entertainers. Yet those names also are trademarks serving to identify commercial enterprises: respectively, a chain of steakhouses, a line of food products, and a fast food franchise. By way of contrast, Cab Calloway never identified a business.

In arguing that Mr. Calloway acquired trademark rights in the name Cab Calloway, Creative Arts incorrectly assumes that the mere fame of a personal name automatically creates a trademark. This is not the law. If a name, regardless of how famous it is, refers primarily to the individual it is not and cannot be protected as a mark. The only personal names that are protected as valid marks are those that no longer primarily identify the individual but instead have acquired a “secondary meaning” so that they are synonymous in the minds of the public with a specific ongoing business, or with the sole source of origin for all goods or services offered

under the name. *Pirone*, 894 F.2d at 583; *Yarmuth-Dion*, 835 F.2d at 993; *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 104 (2d Cir. 1985); *see also* 15 U.S.C. § 1127 (definitions of “trademark” and “service mark”). Put another way, a personal name may be protected as a trademark only if it has come to symbolize “a particular business, product or company.” *Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 203 n.5 (2d Cir. 1979); *accord Cairns v. Franklin Mint Co.*, 107 F. Supp. 2d 1212, 1222 (C.D. Cal. 2000) (to acquire trademark rights in a celebrity name, the name must “no longer primarily identify the individual . . . but instead identify plaintiff’s [business]”).

This Circuit, in *Thompson Medical v. Pfizer*, 753 F.2d 208 (2d Cir. 1985), held that a party seeking to prove secondary meaning, as Creative Arts is required to do here, must meet “vigorous evidentiary requirements.” *Id.* at 217. The burden is on Creative Arts to show that a “significant number” of consumers identify the name Cab Calloway with a particular manufacturer or source. *See Papercutter, Inc. v. Fay’s Drug Co., Inc.*, 900 F.2d 558, 564 (2d Cir. 1990); *Thompson Med.*, 753 F.2d at 217. Evidence to prove secondary meaning includes consumer studies and surveys, sales success and advertising expenditures, none of which were offered into evidence by Creative Arts. *Thompson Med.*, 753 F.2d at 217; *Ideal World Mktg.*, 15 F. Supp. 2d at 245; *Black & Decker*, 944 F. Supp. at 226. Here, like the personal name “Lebow” in *Abraham Zion*, no secondary meaning can be

he appeared in. The source of his recordings and movies was not him, but rather various film and music companies. *See* JA 120 at ¶¶ 3-5.

Even now there is no single source of origin for Mr. Calloway's name. It is used on recordings distributed by at least six different companies (JA 120 at ¶ 3; JA 194-199), it is used to advertise performances by two of his daughters (JA 174; JA 215-218 (63:23-66:23)), and it is used in films (JA 120 at ¶¶ 4-5) which Creative Arts has not alleged are issued, owned or controlled by Mr. Calloway or his successors. It also has been used by the unaffiliated entity Calloway Entertainment. *See* JA 177-93. Reviewing this undisputed evidence, the District Court was correct in holding that "[w]hile [Creative Arts] asserts that Cab Calloway had . . . common law service mark rights during his life, the Court finds no evidence of such rights in the extensive submissions in this case." JA 337-338.

The law is clear that where the only use of the Cab Calloway name that Creative Arts can point to is exclusively to designate the individual Mr. Calloway, trademark rights are not created. *See Pirone*, 894 F.2d at 583 (personal name only protected as a trademark if through usage its meaning designating a person has been submerged in the minds of the public in favor of its meaning designating a business). Creative Arts has not cited any case where trademark rights were created solely by virtue of being famous or as a result of using one's name solely for one's entertainment performances. In this regard, Creative Arts' citation to

EXHIBIT 2

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Attorneys for Defendant
Christopher Brooks

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CREATIVE ARTS BY CALLOWAY, LLC, a
Delaware limited liability company, d/b/a
C.A.B. CALLOWAY, LLC,

Plaintiff,

v.

CHRISTOPHER W. BROOKS, an individual,
d/b/a THE CAB CALLOWAY ORCHESTRA,

Defendant.

01 CIV. 3192 (BDP)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION
TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTON**

associated with goodwill personal and unique to him. Because the goodwill in the name cannot be transferred, the rights in the name "Cab Calloway" also cannot be transferred, and the "Cab Calloway" name does not survive as a trademark owned by the artist's heirs or successors. *Accord Blakely v. Sousa*, 47 A. 286, 288 (Pa. 1900) ("the name of an artist, an author, [or] a musician . . . has never been regarded as a trade name and, as such, salable. The value of the names of such persons depends entirely upon their personal reputation, skill and experience, and is indissolubly connected or associated with the owner.") As such, plaintiff obtained no rights in the "Cab Calloway" name and therefore cannot proceed with its claims.

B. Plaintiff Cannot Show Secondary Meaning In The Term "Cab Calloway."

Assuming for purposes of argument that the transfer by will of rights in the personal name of Mr. Calloway can withstand scrutiny, plaintiff still has no viable common law rights in "Cab Calloway." It is black-letter law that personal names are merely descriptive and are protected only if, through usage, they have acquired distinctiveness and secondary meaning. *See Pirone v. MacMillan, Inc.*, 894 F.2d 579, 583 (2d Cir. 1990); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 104 (2d Cir. 1985); *see also 2 McCarthy* § 13:2 at 13-3, 13-4. Here, as a matter of law, plaintiff cannot show that the name "Cab Calloway" has acquired the requisite secondary meaning to support plaintiff's claims. *See Black & Decker Corp. v. Dunsford*, 944 F. Supp. 220, 228 (S.D.N.Y. 1996) (granting summary judgment where mark had not acquired secondary meaning).

A mark or trade name acquires secondary meaning when "the name and the business have become synonymous in the mind of the public, submerging the primary meaning of the term in favor of its meaning as a word identifying that business." *Pirone*, 894 F.2d at 583 (citation omitted); *see also Cairns v. Franklin Mint Co.*, 107 F. Supp. 2d 1212, 1222 (C.D. Cal.

EXHIBIT 3

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Christopher Brooks

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CREATIVE ARTS BY CALLOWAY, LLC, a
Delaware limited liability company, d/b/a
C.A.B. CALLOWAY, LLC,

Plaintiff,

v.

CHRISTOPHER W. BROOKS, an individual,
d/b/a THE CAB CALLOWAY ORCHESTRA,

Defendant.

01 CIV. 3192 (BDP)

DEFENDANT'S MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT

consisted of Mr. Calloway's personal services that had been preserved on CDs, records, and videos. This is not a business that can be transferred. As such, there could be no valid assignment, by will or otherwise, of the "Cab Calloway" name as a service mark. *Coffey v. Metro-Goldwyn-Mayer Corp.*, 289 N.Y.S. 882 (N.Y. Sup. Ct. 1936); Def.'s Mem. at 9-11. The *Russen* case does not hold to the contrary.

III. PLAINTIFF HAS NOT ESTABLISHED SECONDARY MEANING IN "CAB CALLOWAY" AS A MARK.

Even assuming that rights in the name "Cab Calloway" passed by Mr. Calloway's will and were validly assigned to plaintiff, that does not give plaintiff the right to pursue its claims.⁴ In order for plaintiff to have a legally protectable right in "Cab Calloway," plaintiff must first establish that the name has acquired secondary meaning. *See, e.g., Pirone v. MacMillan, Inc.*, 894 F.2d 579, 583 (2d Cir. 1990); Pl.'s Opp. Mem. at 9-11. Secondary meaning requires that consumers who see the name "Cab Calloway," whether on a record, in connection with the name of defendant's orchestra, on a tee-shirt or otherwise associate these products *not* with Mr. Calloway but with plaintiff. *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 104 (2d Cir. 1985); *Black & Decker Corp. v. Dunsford*, 944 F. Supp. 220, 226 (S.D.N.Y. 1996).

Plaintiff has the burden of proving that a "significant number" of prospective purchasers identify "Cab Calloway" as a trademark or service mark of plaintiff. *Papercutter, Inc. v. Fay's Drug Co.*, 900 F.2d 558, 564 (2d Cir. 1990); *Thompson Med. Co. v. Pfizer, Inc.*, 753 F.2d 208, 217 (2d Cir. 1985). In this Circuit, evidence relevant to determining if secondary meaning exists

⁴ As an aside, plaintiff now contends that it obtained the rights at issue from a settlement with Calloway Entertainment, whose predecessors allegedly received a grant of rights from Mr. Calloway. (Pl.'s Opp. Mem. at 5.) Plaintiff's reliance on this transfer vitiates its claims that rights in the "Cab Calloway" name passed by will, since, for such a transfer from Calloway Entertainment to have any validity, it would require that at the time of his death Mr. Calloway no longer possessed the rights to his name.

EXHIBIT 4

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CREATIVE ARTS BY CALLOWAY, LLC, a
Delaware limited liability company, d/b/a
C.A.B. CALLOWAY, LLC,

Plaintiff,

v.

CHRISTOPHER W. BROOKS, an individual,
d/b/a THE CAB CALLOWAY ORCHESTRA,

Defendant.

01 CIV. 3192 (BDP)

DECLARATION OF BOB BASS

I, Bob Bass, declare under penalty of perjury as follows:

1. I am the owner of Gear Ink. New Orleans ("Gear"), a corporation located at 715 Bordeaux Street, New Orleans, Louisiana 70115. I have been president and owner of Gear since March 1, 1996 when I acquired the company. All of the facts set forth below are true and based on my knowledge of Gear as well as on the books and records of the company. If required to, I could personally testify to the facts set forth herein. I am not a party to the litigation and have not been paid for my declaration or promised anything in return for providing these facts.

2. Gear manufactures and sells t-shirts featuring jazz, blues and rhythm and blues artists. Most of our designs feature vintage photographs of artists. We offer about 80 different shirt designs. One of these designs features a photograph of Cab Calloway. The artwork that appears on the shirt is shown in Exhibit R. The shirt costs \$15.95 (\$17.95 for size XXL), or \$9.00 wholesale. This is the only shirt that we offer, and that has been offered at least since 1996, that bears the name or likeness of Cab Calloway

3. Gear does not have a written agreement with Creative Arts by Calloway LLC, with Zulme Calloway or with any third party. We do not submit our shirts to anyone for approval. We do, however, pay royalties of 5% of gross sales to Zulme Calloway.

4. In 1997, Calloway Entertainment sent the letter attached as Exhibit S to Gear. The individual to whom the letter is addressed no longer was involved with the company. According to the letter, Gear entered into a license agreement with Cab Calloway sometime in 1991 giving Gear the right to use Mr. Calloway's name and likeness on t-shirts and sweatshirts. I have never seen a copy of that agreement, nor is there a copy in the records of Gear. According to the attached letter, the written agreement expired in 1993.

5. Since I acquired the company, Gear has spent no more than \$1000 on advertising merchandise featuring Cab Calloway. This advertising consisted of a single ad in *Jazz Times* magazine that ran in 2000 and a flyer that was distributed during Christmas 2000. These ads were for our entire product line, not merely the Cab Calloway shirt. In addition, Gear maintains a website at www.gearink.com. Mr. Calloway's name does not, and since at least 1996 has not, appeared on the homepage.

However, consumers can search by name for artists who appear on our shirts and can order a shirt featuring Mr. Calloway from our site.

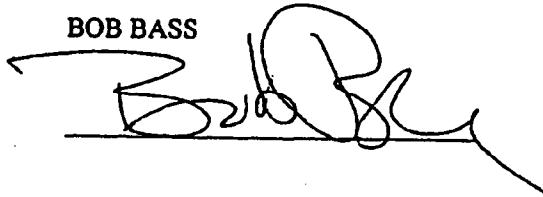
6. Sales of t-shirts bearing Mr. Calloway's likeness have been minimal. In reviewing royalty reports, I can state that since 1996, total sales of the Cab Calloway shirt amount to \$ 10,013.40.

7. Gear sells about 80 different shirts. Sales of the Cab Calloway shirt are among the lowest of all our products.

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Dated this 14th day of June, 2001, New Orleans, Louisiana.

BOB BASS

A handwritten signature in black ink, appearing to read 'Bob Bass', written over a horizontal line.

I:\BSOLOMON\cwbk\Bob Bass Declaration.doc